

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

No. 301.

THE PENNSYLVANIA RAILROAD COMPANY, PETITIONER,

vs.

KITTANING IRON AND STEEL MANUFACTURING
COMPANY.

ON WRIT OF HABEAS CORPUS TO THE SUPREME COURT OF THE STATE
OF PENNSYLVANIA.

PETITION FOR HABEAS CORPUS FILED FEBRUARY 14, 1919.

HABEAS CORPUS AND RETURN FILED MAY 4, 1919.

(26,949)

(26,949)

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In the Supreme Court of Pennsylvania, Western District,
Returnable at Pittsburgh, October Term, 1918.

No. 48.

THE PENNSYLVANIA RAILROAD COMPANY, a Corporation, Appellant,

vs.

KITTANNING IRON & STEEL MANUFACTURING COMPANY,
a Corporation.

Appeal by Plaintiff from the Judgment of the Court of Common
Pleas, at No. 1249 April Term, 1917, on a Case Stated.

Names of Parties and Form of Action.

The Pennsylvania Railroad Company, a Corporation, Appellant,
vs. Kittanning Iron & Steel Manufacturing Company, a Corporation.
Case Stated.

Docket Entries.

STATE OF PENNSYLVANIA,
County of Allegheny, ss:

In the Court of Common Pleas of Allegheny County, Pa., April
Term, 1917. Docket "A."

No. 1249.

THE PENNSYLVANIA RAILROAD COMPANY, a Corporation,

vs.

KITTANNING IRON & STEEL MANUFACTURING COMPANY, a Corp.

1249.

February 23, 1917.

Case stated. And now, Jany. 30, 1917, it is hereby agreed by the
parties to the above entitled case that the following case be stated
for the opinion of the Court in the nature of a special Verdict.
Whether the Plff. is entitled to the whole of the demurrage charges
claimed under the provisions of the "Car Demurrage Rules" then
judgment is to be entered for the Plff. & against Deft. in the sum
of \$4,029.00 with interest thereon from April 30, 1913, or such part
thereof as the Court shall consider the Plff. entitled to. It being
admitted that the Deft. is indebted to the Plff. for \$2,612.00 of the

amount claimed each party reserves the right of appeal. Feby. 23, 1917, agreement for amicable action be entered between the above parties with same force & effect as though a Summons in assumpsit had been issued by Plff. against Deft. returnable to 1st Monday of

March, 1917, and had been duly returned "Served" it is also

3 agreed that a Judgment be entered in favor of Penna. R. R. Co. & against Kittanning Iron & Steel Mfg. Co., a corp., which is hereby confessed for the sum of \$2,612.00 with interest from date Deft. waives all stay of execution and all benefit of exemption of property real and personal. All errors and all right of appeal as to said amount of \$2,612.00 for which judgment is confessed. Said judgment being confessed for money due Plff. upon the following statement for demurrage accruing at Kittanning, Pa. between Nov. 1 1912, to April 30, 1913. April 23, 1917, It is ordered that judgment be entered for the Plff. Eo Die, opinion filed. And now, Sept. 14, 1917, judgment is hereby entered in favor of the Plaintiff and against the Defendant for the sum of \$2,820.00 with interest, from April 30, 1913. Eo Die, exception allowed to Plaintiff. Eo Die, opinion filed. Feb. 13, 1918, Certiorari in appeal ex parte Plaintiff to the Supreme Court filed. Eo Die, Bond in sum of \$500.00 with the Pennsylvania Railroad Company as principal and Guarantee Company of North America a corporation as surety filed.

From the record.

WM. B. KIRKER,
Prothonotary.

[SEAL.]

Statement of Question Involved.

Whether under its demurrage tariffs, the Railroad Company is entitled to demurrage on certain cars of frozen ore consigned to the Steel Company?

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Case Stated.

Filed February 3, 1917.

And now, January 30, 1917, it is hereby agreed by and between the parties to the above entitled case, that the following case be stated for the opinion of the Court in the nature of a special verdict:

1. The plaintiff, the Pennsylvania Railroad Company (hereinafter called the Railroad Company) is and was at all times herein mentioned, a corporation organized and existing under the laws of the State of Pennsylvania and engaged as a common carrier of goods and merchandise by railroad within the town of Kittanning and elsewhere in the State of Pennsylvania.

2. The defendant, Kittanning Iron & Steel Manufacturing Company (hereinafter called the Steel Company) is and was at said times, a corporation under the laws of Pennsylvania engaged in the manufacture of iron and steel, with its principal plant at Kittan-

ning, Pennsylvania, but maintaining the office of its President in the City of Pittsburgh, Allegheny County.

3. During the period between November 1, 1912, and April 30, 1913, the Railroad Company had in effect (and duly printed, published, kept open and filed with the Interstate Commerce Commission, in accordance with the provisions of the Act of February 4, 1887, known as the Interstate Commerce Act, and the supplements and amendments thereto) two tariffs known as "Car Demur-
5 rage Rules" and officially designated as "T. D. I. C. C. Nos. 48 and 50," the latter of which superseded the former, the provisions of both being identical as regards the points here in controversy.

True and correct copies of said tariffs are hereto attached, made part hereof and marked Exhibits "A" and "B," respectively, reference to which is hereby made as though the same were set out fully and at large.

4. Prior to the period aforesaid, the Steel Company and the Railroad Company had entered into the Average Demurrage Agreement, provided for in Rule 9 of said Car Demurrage Rules, and said Average Agreement was in force during all of said period.

5. Under the provisions of said Average Demurrage Agreement, the Railroad Company charged the Steel Company, during said period, for demurrage amounting to \$4029.00, of which amount the Steel Company, on advice of counsel, now admits that the sum of \$2612.00 is justly due and owing by it to the Railroad Company, and consents that judgment be entered against it in that amount.

6. Of the charges remaining in controversy, charges to the amount of \$208.00 accrued during March 26th, 27th and 28th, 1913. During that time, the tracks of the Railroad Company above and below Kittanning and in numerous other places along the Allegheny River, were inundated by an extraordinary flood, the high water mark exceeding any since 1865. By reason of said flood, freight traffic on the lines of the Railroad Company in the vicinity of Kittanning was totally suspended during the said three
6 days, and the Railroad Company would not have been able during those days to haul away from the interchange track any empty cars which might have been returned thereto by the Steel Company.

Of said charges amounting to \$208.00 and accruing during the high water aforesaid, charges to the amount of \$174.00 accrued on 58 cars, on which the free time had expired before March 26th, 1913.

Rule 8 of said Demurrage Rules contains the following provision in regard to high water:

"Rule 8. No demurrage charges shall be collected under these rules for detention of cars through causes named below."

Section A, paragraph 3:

"When, because of high water or snow drifts, it is impossible to get to cars for loading or unloading during the prescribed free time."

Section C of Rule 9 of the Average Agreement provides, that:

"A shipper or receiver who elects to take advantage of this average agreement shall not be entitled to cancellation or refund of demurrage charges under Section A, paragraphs — 3 (of Rule 8.)"

7. \$1209.00 of the amount of demurrage in controversy accrued during the months of December, 1912, February and March of 1913, on cars containing ore which had become frozen in transit, all of which cars were interstate shipments consigned to the defendant at Kittanning from points without the State of Pennsylvania.

7 The dates when such cars of frozen ore were placed on the interchange tracks of the Steel Company for unloading, and the number of cars placed on said dates, are correctly shown in the schedule hereto attached and made part hereof, marked Exhibit "C."

As to the cars of frozen ore, reference is hereby made to Rule 8, Section A, Paragraph 2 of the Car Demurrage Rules, providing:

(That no demurrage shall be collected) "When shipments are frozen while in transit so as to prevent unloading during the prescribed free time. This exemption shall not include shipments which are tendered to consignee in condition to unload. Under this rule, consignees will be required to make diligent effort to unload such shipments."

8. During the period aforesaid, the Steel Company had at its plant a device for "steaming" cars of frozen ore by means of which it was possible for the Steel Company, by using diligent effort, to unload not more than five cars of frozen ore a day.

Section C of Rule 9 of the Average Demurrage Agreement provides:

"A shipper or receiver who elects to take advantage of this average agreement shall not be entitled to cancellation or refund of demurrage charges under — Section B of Rule 8."

Section B of Rule 8 provides:

"2. Cars for unloading or reconsigning. When, as the result of the act or neglect of any carrier, cars destined for one consignee, at one point, are bunched at originating point, in transit, or at destination, and delivered by the Railroad Company in accumulated numbers in excess of daily shipments, the consignee shall be allowed such free time as he would have been entitled to had the cars been delivered in accordance with the daily rate of shipment. Claim to be presented to Railroad Company's agent within fifteen (15) days."

It is agreed that no claim for allowance on account of bunching was presented by the Steel Company to the Railroad Company, through its Agent at Kittanning, or otherwise, within fifteen days after the date on which the demurrage bill for these cars of frozen ore was rendered.

9. If the Court be of the opinion that the plaintiff is entitled to the whole of the demurrage charges claimed under the provisions of the "Car Demurrage Rules" aforesaid, then judgment is to be entered for the plaintiff and against the defendant in the sum of \$4029.00, with interest thereon from April 30, 1913, or such part thereof as the Court shall consider the plaintiff entitled to,—it being admitted that the defendant is indebted to the plaintiff for \$2612.00 of the amount claimed. Each party reserves the right of appeal.

THE PENNSYLVANIA RAILROAD COMPANY,
By PATTISON, CRAWFORD & MILLER,

Its Attorneys.

KITTANNING IRON AND STEEL MANUFACTURING CO.,
By R. L. RALSTON,
Its Attorney.

EXHIBIT "A."

Only One Supplement to this Tariff Will be in Effect at any Time.

T. D.—P. S. C.—2 N. Y.—No. 5.

Superseding T. D.—P. S. C.—2 N. Y.—No. 4.

T. D.—P. S. C.—Md.—No. 3.

Superseding T. D.—P. S. C.—Md. No. 1.

T. D.—I. C. C. No. 48.

Superseding T. D.—I. C. C. No. 27.

Pennsylvania Railroad Company.

Northern Central Railway Company.

Philadelphia, Baltimore & Washington Railroad Company.

West Jersey & Seashore Railroad Company.

Car Demurrage Rules
Governing at all Stations and Sidings
Except as Shown Within
on the Lines
of the
Above-named Companies.

Effective September 1, 1912.

Issued July 29, 1912, by

R. M. PATTERSON,
Superintendent Freight Transportation,
Philadelphia, Pa.

Approved:

C. M. SHEAFFER,
General Superintendent Transportation.

Agent's Index No. 491.

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Rule I.

Cars Subject to Rules.

Cars held for or by consignors or consignees for loading, unloading, forwarding directions, or for any other purpose, are subject to these demurrage rules, except as follows:

Section A. Car loaded with live stock.

Section B. Empty cars placed for loading coal at mines or mine sidings, or coke at coke ovens, and cars under load with coal at mines or mine sidings or coke at coke ovens.

Section C. Empty private cars stored on Railroad Company or private tracks, provided such cars have not been placed or tendered for loading on the orders of a shipper.

NOTE.—Private cars while in railroad service, whether on Railroad Company or private tracks, are subject to these demurrage rules to the same extent as cars of railroad ownership.

(Empty private cars are in railroad service from the time they are placed by the Railroad Company for loading or tendered for loading on the orders of a shipper. Private cars under lading are in railroad service until the lading is removed and cars are regularly released. Cars which belong to an industry performing its own switching service are in railroad service from the time they are placed by the industry upon designated interchange tracks and thereby tendered to the Railroad Company for movement. If such cars are subsequently returned empty they are out of service when withdrawn by the industry from the interchange; if returned under load, railroad service is not at an end until the lading is duly removed.)

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Rule 2.

Free Time Allowed.

Section A. Forty-eight hours (two days') free time will be allowed for loading or unloading on all commodities.

Section B. Twenty-four hours' (one day) free time will be allowed:

1. When cars are held for switching orders.

NOTE.—Cars held for switching orders are cars which are held by the Railroad Company to be delivered to a consignee within switching limits and which when switched become subject to an additional charge for such switching movement.

If a consignee wishes his car held at any break-up yard or a

hold-yard before notification and placement, such car will be subject to demurrage. That is to say, the time held in the break-up yard will be included within the 48 hours of free time. If he wishes to exempt his cars from the imposition of demurrage he must either by general orders given to the Railroad Company or by specific orders as to incoming freight notify the Railroad Company of the track upon which he wishes his freight placed, in which event he will have the full 48 hours' free time from the time when the placement is made upon the track designated.

2. When cars are held for reconsignment or reshipment in same car received, and when cars are held in transit on order of consignor or consignee.

NOTE.—A reconsignment is a privilege permitted by tariff under which the original consignee has the right of diversion. In event of the presence of such a privilege in the tariff 24 hours' free time is allowed for the exercise of that privilege by the consignee.

12 A shipment under this rule is the making of a new contract of shipment by which under a new rate the consignee forwards the same car to another destination.

3. When cars destined for delivery to or for forwarding by a connecting line are held for surrender of bill of lading or for payment of lawful freight charges.

4. When cars are held in transit and placed for inspection or grading. When cars loaded with grain or hay are so held subject to recognized official inspection and such inspection is made after 12 o'clock noon, 24 hours (one day) extra will be allowed for disposition.

5. When cars are stopped in transit to complete loading, to partly unload or to partly unload and partly reload (when such privilege of stopping in transit is allowed in the tariffs of the Railroad Company).

6. On cars containing freight in bond for Customs entry and Government inspection.

Section C. Cars containing freight for transshipment to vessel will be allowed such free time at the port as may be provided in the tariffs of the Railroad Company.

Rule 3.

Computing Time.

NOTE.—In computing time, Sundays and legal holidays (National, State and Municipal) will be excluded. When a legal holiday falls on a Sunday, the following Monday will be excluded.

Section A. On cars held for loading, time will be computed from the first 7 a. m. after placement on public delivery tracks. See Rule 6 (Cars for Loading).

Section B. On cars held for orders, time will be computed
13 from the first 7 a. m. after the day on which notice of arrival
is sent to the consignee.

Section C. On cars held for unloading, time will be computed
from the first 7 a. m. after placement on public-delivery tracks, and
after the day on which notice of arrival is sent to consignee.

Section D. On cars to be delivered on any other than public-
delivery tracks, time will be computed from the first 7 a. m. after
actual or constructive placement on such tracks. See Rule 4 (Noti-
fication) and Rules 5 and 6 (Constructive Placement).

NOTE.—“Actual Placement” is made when a car is placed in an
accessible position for loading or unloading or at a point previously
designated by the consignor or consignee.

Section E. On cars to be delivered on interchange tracks of indus-
trial plants performing their own switching service, time will be
computed from the first 7 a. m. following actual or constructive
placement on such interchange tracks until return thereto. See
Rule 4 (Notification) and Rules 5 and 6 (Constructive Placement).
Cars returned loaded will not be recorded released until necessary
billing instructions are given.

Rule 4.

Notification.

Section A. Consignee shall be notified by Railroad Company's
agent in writing, or as otherwise agreed to by Railroad Company
and consignee, within twenty-four hours after the arrival of cars
and billing at destination, such notice to contain point of shipment,
car initials and numbers, and the contents, and, if trans-
14 ferred in transit, the initials and numbers of the original
car. In case car is not placed on public-delivery track within
twenty-four hours after notice of arrival has been sent, a notice of
placement shall be given to consignee.

Section B. When cars are ordered stopped in transit the party or-
dering the cars stopped shall be notified upon arrival of cars at point
of stoppage.

Section C. Delivery of cars upon any other than public-delivery
tracks or upon industrial interchange tracks, or written notice to
consignee of readiness to so deliver, will constitute notification
thereof to consignee.

Section D. In all cases where notice is required the removal of any
part of the contents of a car by the consignee shall be considered
notice thereof to the consignee.

Rule 5.

Placing Cars for Unloading.

Section A. When delivery of cars consigned or ordered to any other than public-delivery tracks or to industrial interchange tracks cannot be made on account of the act or neglect of the consignee, or the inability of the consignee to receive, delivery will be considered to have been made when the cars were tendered. The Railroad Company's agent must give the consignee written notice of all cars he has been unable to deliver because of the condition of the private or interchange tracks, or because of other conditions attributable to consignee. This will be considered constructive placement. See Rule 4 (Notification).

Section B. When delivery cannot be made on specially designated public-delivery tracks on account of such tracks being fully occupied, or from other cause beyond the control of the Railroad Company, the Railroad Company shall notify the consignee of its intention to make delivery at the nearest point available to the consignee, naming the point. Such delivery shall be made unless the consignee shall before delivery indicate a preferred available point, in which case the preferred delivery shall be made.

Rule 6.

Cars for Loading.

Section A. Cars for loading will be considered placed when such cars are actually placed or held on orders of the consignor. In the latter case the agent must give the consignor written notice of all cars which he has been unable to place because of condition of the private track or because of other conditions attributable to the consignor. This will be considered constructive placement. See Rule 3, Section A (Computing Time).

Section B. When empty cars, placed for loading on orders, are not used, demurrage will be charged from the first 7 a. m. after placing or tender until released, with no time allowance.

Rule 7.

Demurrage Charge.

After the expiration of the free time allowed a charge of \$1.00 per car per day, or fraction of a day, will be made until car is released.

Rule 8.

Claims.

No demurrage charges shall be collected under these rules for detention of cars through causes named below. Demurrage charges assessed or collected under such conditions shall be promptly canceled or refunded by the Railroad Company.

Causes.

Section A. Weather interference.

1. When the condition of the weather during the prescribed free time is such as to make it impossible to employ men or teams in loading or unloading, or impossible to place freight in cars, or to move it from cars, without serious injury to the freight, the free time shall be extended until a total of 48 hours free from such weather interference shall have been allowed.

2. When shipments are frozen while in transit so as to prevent unloading during the prescribed free time. This exemption shall not include shipments which are tendered to consignee in condition to unload. Under this rule consignees will be required to make diligent effort to unload such shipments.

3. When, because of high water or snow-drifts, it is impossible to get to cars for loading or unloading during the prescribed free time.

NOTE.—Section A, Paragraphs 1, 2 and 3, shall not absolve a consignor or consignee from liability for demurrage if others similarly situated and under the same conditions are able to load or unload cars.

Section B. Bunching.

1. Cars for loading.—When, by reason of delay or irregularity of the Railroad Company in filling orders, cars are bunched and placed for loading in accumulated numbers in excess of daily orders, the shipper shall be allowed such free time for loading as he would have been entitled to had the cars been placed for loading as ordered.

2. Cars for unloading or reconsigning.—When, as the result of the act or neglect of any carrier, cars destined for one consignee, at one point, are bunched at originating point, in transit, or at destination, and delivered by the Railroad Company in accumulated numbers in excess of daily shipments, the consignee shall be allowed such free time as he would have been entitled to had the cars been delivered in accordance with the daily rate of shipment. Claims to be presented to Railroad Company's agent within fifteen (15) days.

Section C. Demand of overcharge.

When the Railroad Company's agent demands the payment of transportation charges in excess of tariff authority.

Section D. Delayed or improper notice by Railroad Company.—When notice has been given in substantial compliance with the requirements as specified in these rules, the consignee shall not thereafter have the right to call in question the sufficiency of such notice unless within forty-eight hours from 7 a. m. following the day on which notice is sent he shall serve upon the Railroad Company a full written statement of his objections to the sufficiency of such notice.

1. When claim is made that a mailed notice has been delayed the postmark thereon shall be accepted as indicating the date of the notice.

2. When notice is mailed by the Railroad Company on Sunday, a legal holiday, or after 3 p. m. on other days (as evidenced by the postmark thereon) the consignee shall be allowed five hours' additional free time, provided he shall mail or send to the Railroad Company's agent, within the first twenty-four hours of free time, written advice that the notice had not been received until after the free time had begun to run; in case of failure on the part of consignee so to notify Railroad Company's agent, no additional free time shall be allowed.

Section F. Railroad errors which prevent proper tender or delivery.

Section F. Delay by United States Customs.—Such additional free time shall be allowed as has been lost through such delay.

Rule 9.

Average Agreement.

When a shipper or receiver enters into the following agreement, the charge for detention to cars, provided for by Rule 7, on all cars held for loading or unloading by such shipper or receiver shall be computed on the basis of the average time of detention to all such cars released during each calendar month, such average detention to be computed as follows:

Section A. A credit of one day will be allowed for each car released within the first twenty-four hours of free time. A debit of one day will be charged for each twenty-four hours or fraction thereof that a car is detained beyond the first forty-eight hours of free time. In no case shall more than one day's credit be allowed on any one car, and in no case shall more than five (5) days' credit be applied in cancellation of debits accruing on any car, making a maximum of seven (7) days that any car may be held free; this to include Sundays and holidays.

Section B. At the end of the calendar month the total number of days credited will be deducted from the total number of days debited, and \$1.00 per day charged for the remainder. If the credits equal or exceed the debits, no charge will be made for the detention of the cars, and no payment will be made to shippers or receivers on account of such excess of credits, nor shall the credits in excess of the debits of any one month be considered in computing the average detention for another month.

Section C. A shipper or receiver who elects to take advantage of this average agreement shall not be entitled to cancellation or refund of demurrage charges under Section A, Paragraphs 1 and 3, or Section B of Rule 8.

Section D. A shipper or receiver who elects to take advantage of this average agreement may be required to give sufficient security to the Railroad Company for the payment of balances against him at the end of each month.

Agreement.

To — Rail— Company:

In accordance with the terms of Rule 9 of the Car Demurrage Rules of the — Rail — Company, as set forth in T. D.—I. C. C. No. 48, T. D.—P. S. C.—2 N. Y.—No. 5, and T. D.—P. S. C.—Md.—No. 3, and reissues thereof or supplement thereto, reading as follows:

(Insert Rule 9 in agreement.)

I (or we) do expressly agree with the above-named rail— company that I (or we) will make prompt payment of all demurrage charges accruing in accordance with Rule 9 (time on intrastate and interstate business to be computed in accordance with Rules 2, 3, 4, 5 and 6) during the continuance of this agreement on cars held for loading or unloading by me (or us) or on my (or our) account at — station of the above-named rail— company. This agreement is to take effect —, 19—, and to continue until terminated by written notice from either party to the other, which notice shall become effective on the first day of the month succeeding that in which it is given.

Approved and accepted —, 19—, by and on behalf of the above-named rail— company by — —.

EXHIBIT "B."

Only One Supplement to this Tariff Will be in Effect at Any Time.

T. D.—P. S. C.—2 N. Y.—No. 6.
 Superseding T. D.—P. S. C.—2 N. Y.—No. 5.
 T. D.—P. S. C.—Md.—No. 4.
 Superseding T. D.—P. S. C.—Md.—No. 3.
 T. D.—I. C. C. No. 50.
 Superseding T. D.—I. C. C. No. 48.

Pennsylvania Railroad Company.
 Northern Central Railway Company.
 Philadelphia, Baltimore & Washington Railroad Company.
 West Jersey & Seashore Railroad Company.

21

Car Demurrage Rules
 Governing at all Stations and Sidings
 (Except as Shown Within)
 on the Lines
 of the
 Above-named Companies
 and
 New York & Long Branch Railroad.

Issued November 30, 1912, by
 R. M. PATTERSON,
Superintendent Freight Transportation,
Philadelphia, Pa.
 Effective January 1, 1913.

Approved:
 C. M. SHEAFFER,
General Superintendent Transportation.

Agent's Index No. 491.

Rule 1.

Cars Subject to Rules.

Cars held for or by consignors or consignees for loading, unloading, forwarding directions, or for any other purpose, are subject to these demurrage rules, except as follows:

Section A. Cars loaded with live stock.

Section B. Empty cars placed for loading coal at mines or mine sidings, or coke at coke ovens, and such cars under load with coal at mines or mine sidings or coke at coke ovens.

NOTE.—Delay to cars specified in Section B will be regulated by proper Car Distribution Rules.

22 Section C.—Empty private cars stored on Railroad Company or private tracks, provided such cars have not been placed or tendered for loading on the orders of a shipper.

NOTE.—Private cars while in railroad service, whether on Railroad Company or private tracks, are subject to these demurrage rules to the same extent as cars of railroad ownership.

(Empty private cars are in railroad service from the time they are placed by the Railroad Company for loading or tendered for loading on the orders of a shipper. Private cars under lading are in railroad service until the lading is removed and cars are regularly released. Cars which belong to an industry performing its own switching service are in railroad service from the time they are placed by the industry upon designated interchange tracks and thereby tendered to the Railroad Company for movement. If such cars are subsequently returned empty they are out of service when withdrawn by the industry from the interchange; if returned under-load, railroad service is not at an end until the lading is duly removed.)

Rule 2.

Free Time Allowed.

Section A. Forty-eight hours' (two days) free time will be allowed for loading or unloading on all commodities.

Section A. Forty-eight hours' (two days') free time will be allowed—

1. When cars are held for switching orders.

23 NOTE.—Cars held for switching orders are cars which are held by the Railroad Company to be delivered to a consignee within switching limits and which when switched become subject to an additional charge for such switching movement.

If a consignee wishes his car held at any break-up yard or a hold-yard before notification and placement, such car will be subject to demurrage. That is to say, the time held in the break-up yard will be included within the 48 hours of free time. If he wishes to exempt his cars from the imposition of demurrage he must either by general orders to the Railroad Company or by specific orders as to incoming freight notify the Railroad Company of the track upon which he wishes his freight placed, in which event he will have the full 48 hours' free time from the time when the placement is made upon the track designated.

2. When cars are held for reconsignment or reshipment in same car received, and when cars are held in transit on order of consignor or consignee.

NOTE.—A reconsignment is a privilege permitted by tariff under which the original consignee has the right of diversion. In event of the presence of such a privilege in the tariff 24 hours' free time is allowed for the exercise of that privilege by the consignee. A re-shipment under this rule is the making of a new contract of shipment by which under a new rate the consignee forwards the same car to another destination.

3. When cars destined for delivery to or for forwarding by a connecting line are held for surrender of bill of lading or for payment of lawful freight charges.

24 4. When cars are held in transit and placed for inspection or grading. When cars loaded with grain or hay are so held subject to recognized official inspection and such inspection is made after 12 o'clock noon, 24 hours (one day) extra will be allowed for disposition.

5. When cars are stopped in transit to complete loading, to partly unload or to partly unload and partly reload (when such privilege of stopping in transit is allowed in the tariffs of the Railroad Company.)

6. On cars containing freight in bond for Customs entry and Government inspection.

Section C. Cars containing coastwise and export freight held at terminal points at New York Harbor for transshipment to vessel will be allowed the free time provided in G. O.—I. C. C. No. 3985, supplements thereto and reissues thereof. (Also see Exceptions on pages 3 and 4 hereof.)

NOTE.—In computing time, Sundays and legal holidays (National, State and Municipal) will be excluded, except as otherwise provided in Section A of Rule 9. When a legal holiday falls on a Sunday, the following Monday will be excluded.

Section A. On cars held for loading, time will be computed from the first 7 a. m. after placement on public-delivery tracks. See Rule 6 (Cars for Loading).

Section B. On cars held for orders, time will be computed from the first 7 a. m. after the day on which notice of arrival is sent to the consignee.

Section C. On cars held for unloading, time will be computed from the first 7 a. m. after placement on public-delivery tracks, and after the day on which notice of arrival is sent to consignee.

25 Section D. On cars to be delivered on any other than public-delivery tracks, time will be computed from the first 7 a. m. after actual or constructive placement on such tracks. See Rule 4 (Notification) and Rules 5 and 6 (Constructive Placement).

NOTE.—"Actual Placement" is made when a car is placed in an accessible position for loading or unloading or at a point previously

designated by the consignor or consignee, or, if such placing is prevented from any cause attributable to consignor or consignee, "Actual Placement" is made when car is placed on the private or other than public-delivery track.

Section E. On cars to be delivered on interchange tracks of industrial plants performing their own switching service, time will be computed from the first 7 a. m. following actual or constructive placement on such interchange tracks until return thereto. See Rule 4 (Notification) and Rules 5 and 6 (Constructive Placement). Cars returned loaded will not be recorded released until necessary billing instructions are given.

Rule 4.

Notification.

Section A. Consignee shall be notified by Railroad Company's agent in writing, or as otherwise agreed to by Railroad Company and consignee, within twenty-four hours after arrival of cars and billing at destination, such notice to contain point of shipment, car initials and numbers, and the contents, and, if transferred in transit, the initials and number of the original car. In case car is not placed

26 on public-delivery track within twenty-four hours after notice of arrival has been sent, a notice of placement shall be given to consignee.

Section B. When cars are ordered stopped in transit the party ordering the cars stopped shall be notified upon arrival of cars at point of stoppage.

Section C. Delivery of cars upon any other than public-delivery tracks or upon industrial interchange tracks, or written notice to consignee of readiness to so deliver, will constitute notification thereof to consignee.

Section D. In all cases where notice is required the removal of any part of the contents of a car by the consignee shall be considered notice thereof to the consignee.

Rule 5.

Placing Cars for Unloading.

Section A. When delivery of cars consigned or ordered to any other than public-delivery tracks or to industrial interchange tracks cannot be made on account of the act or neglect of the consignee, or the inability of the consignee to receive, delivery will be considered to have been made when the cars were tendered. The Railroad Company's agent must give the consignee written notice of all cars he has been unable to deliver because of the condition of the private or interchange tracks, or because of other conditions at

attributable to consignee. This will be considered constructive placement. See Rule 4 (Notification).

Section B. When delivery cannot be made on specially designated public-delivery tracks on account of such tracks being fully occupied, or from other cause beyond the control of the Railroad Company, the Railroad Company shall notify the consignee of its intention to make delivery at the nearest point available to the consignee, naming the point. Such delivery shall be made unless the consignee shall before delivery indicate a preferred available point, in which case the preferred delivery shall be made.

Rule 6.

Cars for Loading.

Section A. Cars for loading will be considered placed when such cars are actually placed or held on orders of the consignor. In the latter case the agent must give the consignor written notice of all cars which he has been unable to place because of condition of the private track or because of other conditions attributable to the consigner. This will be considered constructive placement. See Rule 3, Section A (Computing Time).

Section B. When empty cars placed for loading on orders are not used, demurrage will be charged from the first 7 a. m. after placing or tender until released, with no time allowance.

Rule 7.

Demurrage Charge.

After the expiration of the free time allowed, a charge of \$1.00 per car per day, or fraction of a day, will be made until car is released.

Rule 8.

Claims.

No demurrage charges shall be collected under these rules for detention of cars through causes named below. Demurrage charges assessed or collected under such conditions shall be promptly canceled or refunded by the Railroad Company.

Causes.

Section A. Weather interference.

1. When the condition of the weather during the prescribed free time is such as to make it impossible to employ men or teams in loading or unloading, or impossible to place freight in cars, or to

move it from cars, without serious injury to the freight, the free time shall be extended until a total of 48 hours free from such weather interference shall have been allowed, except on a car subject to Rule 2, Section B, Paragraph 5, the free time shall be extended until a total of 24 hours free from such weather interference shall have been allowed.

2. When shipments are frozen while in transit so as to prevent unloading during the prescribed free time. This exemption shall not include shipments which are tendered to consignee in condition to unload. Under this rule consignees will be required to make diligent effort to unload such shipments.

3. When, because of high water or snow-drifts, it is impossible to get to cars for loading or unloading during the prescribed free time.

NOTE.—Section A, Paragraphs 1, 2 and 3, shall not absolve a consignor or consignee from liability for demurrage if others similarly situated and under the same conditions are able to load or unload cars.

Section B. Bunching.

1. Cars for loading. When, by reason of delay or irregularity of the Railroad Company in filling orders, cars are bunched and
20 placed for loading in accumulated numbers in excess of daily orders, the shipper shall be allowed such free time for loading as he would have been entitled to had the cars been placed for loading as ordered.

2. Cars for unloading or reconsigning. When, as the result of the act or neglect of any carrier, cars destined for one consignee, at one point, are bunched at originating point, in transit, or at destination, and delivered by the Railroad Company in accumulated numbers in excess of daily shipments, the consignee shall be allowed such free time as he would have been entitled to had the cars been delivered in accordance with the daily rate of shipment. Claim to be presented to Railroad Company's agent within fifteen (15) days after the date on which demurrage bill is rendered.

Section C. Demand of overcharge.

When the Railroad Company's agent demands the payment of transportation charges in excess of tariff authority.

Section D. Delayed or improper notice by Railroad Company. When notice has been given in substantial compliance with the requirements as specified in these rules, the consignee shall not thereafter have the right to call in question the sufficiency of such notice unless within forty-eight hours from 7 a. m. following the day on which notice is sent he shall serve upon the Railroad Company a full written statement of his objections to the sufficiency of such notice.

1. When claim is made that a mailed notice has been delayed the postmark thereon shall be accepted as indicating the date of the notice.

2. When a notice is mailed by Railroad Company on Sunday, a legal holiday, or after 3 p. m. on other days (as evidenced by the postmark thereon) the consignee shall be allowed five hours' additional free time, provided he shall mail or send to the Railroad Company's agent, within the first twenty-four hours of free time, written advice that the notice had not been received until after the free time had begun to run; in case of failure on the part of consignee so to notify Railroad Company's agent, no additional free time shall be allowed.

Section E. Railroad errors which prevent proper tender or delivery.

Section F. Delay by United States Customs.—Such additional free time shall be allowed as has been lost through such delay.

Rule 9.

Average Agreement.

When a shipper or receiver enters into the following agreement the charge for detention to cars provided for by Rule 7, on all cars held for loading or unloading by such shipper or receiver shall be computed on the basis of the average time of detention to all such cars released during each calendar month, such average detention to be computed as follows:

Section A. A credit of one day will be allowed for each car released within the first twenty-four hours of free time (except for a car subject to Rule 2, Section B, Paragraph 5). A debit of one day will be charged for each twenty-four hours or fraction thereof that a car is detained beyond the free time. In no case shall more than one day's credit be allowed on any one car, and in no case shall more than five (5) days' credits be applied in cancellation of debits accruing on any one car. When a car has accrued five debits, the charge provided for by Rule 7 will be made for all subsequent detention, including Sundays and holidays.

Section B. At the end of the calendar month the total number of days credited will be deducted from the total number of days debited, and \$1.00 per day charged for the remainder. If the credits equal or exceed the debits, no charge will be made for the detention of the cars, and no payment will be made to shippers or receivers on account of such excess of credits, nor shall the credits in excess of the debits of any one month be considered in computing the average detention for another month.

Section C. A shipper or receiver who elects to take advantage of this average agreement shall not be entitled to cancellation or refund

of demurrage charges under Section A, Paragraphs 1 and 3, or Section B of Rule 8.

Section D. A shipper or receiver who elects to take advantage of this average agreement may be required to give sufficient security to the Railroad Company for the payment of balances against him at the end of each month.

Agreement.

To — Rail— Company:

In accordance with the terms of Rule 9 of the Car Demurrage Rules of the — Rail— Company, as set forth in T. D.—I. C. C. No. 50, T. D.—P. S. C.—2 N. Y.—No. 6, and T. D.—P. S. C.—32 Md.—No. 4, and reissues thereof or supplement thereto, reading as follows:

(Insert Rule 9 in agreement.)

I (or we) do expressly agree with the above-named rail— company that I (or we) will make prompt payment of all demurrage charges accruing in accordance with Rule 9 (time on intrastate and interstate business to be computed in accordance with Rules 2, 3, 4, 5 and 6) during the continuance of this agreement on cars held for loading or unloading by me (or us) or on my (or our) account at — station of the above-named rail— company. This agreement is to take effect —, 19—, and to continue until terminated by written notice from either party to the other, which notice shall become effective on the first day of the month succeeding that in which it is given.

Approved and accepted —, 19—, by and on behalf of the above-named rail— company by — —.

33

EXHIBIT "C."

Filed February 23, 1917.

Date When Placed
on Interchange
Track.

No. of Cars

1912.

Dec. 9	25
10	12
11	37
12	14
13-14	27
18-19	2

1913.

Feb. 1	1
4	1
9-10	4
11	—
12-13	4
25	6
26	3
27	4
28	—
Mar. 4	1
5	8
8	19
10	10
3	35
6-7	8
11	3

227

34

Opinion.

Filed April 23, 1917.

EVANS, J.

This is a case stated, and the subject in controversy was a claim on the part of the Railroad Company for demurrage on interstate shipments of ore to the defendant company on an interchange track at its works at Kittanning. The defense of the Steel Company divides the claim of the plaintiff into two classes: First, a claim amounting to \$208.00, which was demurrage charges that accrued March 26, 27 and 28, 1917, and during those three days the tracks of the Railroad Company were flooded above and below Kittanning to such an extent that the operations of the railroad were suspended in the immediate vicinity of Kittanning. The interchange tracks, however,

were not flooded and there was no difficulty in the Steel Company getting to and from the interchange track. It is claimed by the defendant that as the Railroad Company could not during these three days have removed the cars from the interchange track, or in any manner made use of them, they cannot charge demurrage for the failure of the Steel Company to deliver them to the interchange track. To sustain such a contention would permit a shipper whenever he was charged with demurrage for the detention of cars over the free time allowed to set up a defense to any charge that if the cars had been delivered to the Railroad Company the Railroad Company was not in a position to make use of them. I do not think that is the law governing the question of the charge for the detention of cars over the free time.

35 The other class is a claim amounting to \$1209.00 which accrued during the months of December, 1912, and February and March of 1913, and the defense of the Steel Company to this claim of demurrage is that the shipments were frozen, and that under the rules of the Railroad Company the Steel Company was not liable for demurrage if it used its best endeavor to unload the shipment in the condition in which it was delivered. The rule in regard to frozen ore is as follows:

That no demurrage shall be collected "when shipments are frozen while in transit so as to prevent unloading during the prescribed free time. This exemption shall not include shipments which are tendered to consignee in condition to unload. Under this rule, consignees will be required to make diligent effort to unload such shipments."

It is admitted that the ore was frozen when delivered; that by diligent effort on the part of the Steel Company it was able to unload ten cars of the ore within the free time of forty-eight hours. But the Railroad Company claims that, first, by reason of the Steel Company taking advantage of what is known as the Average Agreement it was not entitled to take advantage of the Bunching Rule, i. e. the rule which applied to cars that were bunched by the Railroad Company either at the place of shipment, enroute or at the place of consignment. And, second, that the rule above quoted applies to but one car, and that if the Steel Company had facilities for unloading one car of frozen ore within the free time of forty-eight hours it must pay demurrage on all the cars delivered to it which it failed to unload within that time.

36 As to the first contention, it was not the bunching of the cars which prevented the Steel Company from unloading the cars within the free time limit. If the ore had not been frozen the facilities of the defendant for unloading the cars would have taken care of all the cars delivered, and therefore it was the freezing of the cars and not the bunching of the cars which was the cause of the delay.

As to the second contention of the Railroad Company, notwithstanding the very curt opinion of the Secretary of the Interstate Commerce Commission, I am unable to give the interpretation to

that rule contended for by the Railroad Company. Demurrage shall not be collected "when shipments are frozen while in transit." A shipment is a consignment as delivered by the Railroad Company, be it one car or one hundred cars, and there is nothing in the averment of facts to justify the contention that the number of cars delivered at any one time during the period for which this demurrage is charged was due to the bunching of shipments either at the place of shipment, enroute or at the place of delivery.

I am of the opinion that the whole of the demurrage charge as claimed by the Railroad Company for the detention of the cars during the period of the flood is a proper charge, and that as to the second class the defendant is entitled to credit for all the cars containing frozen ore which it was unable to unload within the free time with the facilities which it had, namely, for unloading of the ten cars within the free time.

Let judgment be entered for the plaintiff in accordance with the above opinion.

37

Opinion and Order.

Filed September 14, 1917.

EVANS, J.:

In a former opinion filed in this case, after discussing the questions of law involved, I directed that judgment be entered for the plaintiff in accordance with the above opinion. There was nothing in the Statement of Claim specifically stating what judgment should be entered in case of finding of the Court in any particular way upon the questions involved, and, therefore, I assumed that the exact amount which the plaintiff was entitled to recover would be agreed upon by the parties. As I state, there was no specific statement in this stated case. As to whether or not the plaintiff was entitled to recover anything on the second class of cars discussed in the opinion in this case, I found in favor of the defendant's contention that, if it unloaded five cars a day, it could not be charged demurrage on any extra cars which happened to be on the interchange track at that time. But an examination of the schedule attached to the stated case, marked Exhibit "C," giving the date and number of the cars placed on the interchange track during the months of December, February and March, assuming that the plaintiff removed five cars a day, we have, at a dollar a day, just about the plaintiff's claim of \$1209.00. I, therefore, find that the plaintiff is entitled to recover the \$2612.00, admitted to be due, and the \$208.00 which accrued on cars during the time the tracks were flooded, and is not entitled

38 to recover anything for the detention of the cars placed during the months of December, February and March, in which the ore was frozen.

Order.

And now, September 14th, 1917, judgment is hereby entered in favor of the plaintiff and against the defendant for the sum of \$2820.00, with interest, from April 30th, 1913.

BY THE COURT.

To which order counsel for plaintiff excepts. Exception allowed and bill sealed.

J. A. EVANS. [SEAL.]

39

Agreement and Amicable Action.

Filed February 23, 1917.

It is agreed that an amicable action be entered between the above named parties with the same force and effect as though a summons in assumpsit had been issued by the plaintiff against the defendant, returnable to the first Monday of March, 1917, and had been duly returned "served." It is also agreed that a judgment be entered in favor of the said The Pennsylvania Railroad Company and against the said Kittanning Iron & Steel Manufacturing Company, a corporation, which is hereby confessed for the sum of \$2612.00, with interest from date. And the defendant waives all stay of execution and all benefit of exemption of property, real and personal, under any laws, all errors and all right of appeal as to said amount of \$2612.00 for which judgment is confessed, said judgment being confessed for money due to plaintiff upon the following statement: for demurrage accruing at Kittanning, Pa., between November 1, 1912, and April 30, 1913.

PATTERSON, CRAWFORD & MILLER,
Attorneys for Plaintiff.

R. L. RALSTON,
Attorney for Defendant.

40

Assignment of Error.

Comes now, The Pennsylvania Railroad Company, appellant in the above entitled case, by Patterson, Crawford & Miller, its attorneys, and specifies the following assignment of error in the above entitled case:

First. The Court erred in not entering judgment for the plaintiff and against the defendant for the entire amount of the plaintiff's claim, to-wit: in the sum of \$4,029.00, with interest thereon from April 30, 1913. The order entering judgment and exception thereto being as follows (p. 38):

"Order.

And now, September 14, 1917, judgment is hereby entered in favor of the plaintiff and against the defendant in the sum of \$2,820.00 with interest from April 30, 1913.

BY THE COURT."

"To which order counsel for the plaintiffs except. Exceptions allowed and bill sealed.

J. A. EVANS."

PATTERSON, CRAWFORD & MILLER,
*Attorneys for The Pennsylvania
Railroad Company, Appellant.*

41 *Unreported Decision of Interstate Commerce Commission.*

October 18th, 1913.

Claim of P., B. & W. R. R. Co. against Terminal Coal Co.

Demurrage \$62.00.

The Interstate Commerce Commission,
Sun Building, Washington, D. C.

GENTLEMEN:

On behalf of the Philadelphia, Baltimore & Washington Railroad Company, as well as on behalf of the Terminal Coal Company, I am transmitting herewith the papers having reference to the above claim, to which we ask leave to invite the attention of the Commission.

The facts in the matter are fully developed in the file, and in particular in the letters of Auditor Kraft, dated May 2nd, 1913, and July 26th, 1913.

As will be observed, the coal which constituted the subject matter of the shipment, arrived at destination in a frozen condition and this condition interfered with the unloading, although any single car might have been unloaded within the free time according by the demurrage rules.

It is the Railroad's contention and belief that the demurrage must be assessed with regard to the individual cars, and that, since any single car might have been unloaded in the free time accorded in spite of the condition of the lading, the demurrage has been properly assessed. On the other hand, it is the contention and belief of the Terminal Coal Company that, since the cars arrived at or about the same time and that, since the time expended in unloading certain cars prevented it from giving
42 attention to the other cars which were accordingly constructively

placed—the frozen condition of the lading is what really caused the assessment of the demurrage, and that the charges should be cancelled under the provisions of Rule 8 of the demurrage rules.

As will be observed, this file has already had the attention of the Pennsylvania State Railroad Commission. In the opinion of that body the charges should be cancelled; but as all the cars except one moved in interstate commerce, having passed enroute outside the State of Pennsylvania, although originating in and delivered in Pennsylvania, we deem it proper to submit the matter to your honorable tribunal for its views in the premises.

In view of the fact that the real question is one of tariff construction, or, in other words, since the real question is whether or not the claim is due, the rule of the Commission requiring the payment of charges as a condition precedent to its consideration of such claims, apparently does not apply.

A copy of this letter has been submitted to the Coal Company and approved by it, and it joins with the Railroad Company in hoping that the Commission will express its views in the premises, so that the controversy may be properly and lawfully adjusted.

Very respectfully,

HENRY WOLFE BIKLE,
Assistant General Solicitor.

C. F. P.
Enc.

43

Interstate Commerce Commission

Office of the Secretary.

H. C. W.-T. J. M.

George B. McGinty, Secretary.

Washington, November 13, 1913.

In reply refer to File No. 724178.

Mr. Henry Wolf Bikle,
Assistant General Solicitor,
Pennsylvania Railroad Company,
Philadelphia, Pennsylvania.

DEAR SIR:

Replying to your letter of October 18th, and returning papers relating to claim of the P. B. & W. R. R. Co., against the Terminal Coal Company for demurrage charges on certain shipments of coal consigned to Philadelphia, Pennsylvania:

From examination of this claim it appears that upon the facts stated there is no basis for refund.

Respectfully,

G. B. MCGINTY,
Secretary.

Received November 17, 1913, Legal Department.

44

Interstate Commerce Commission,

Office of the Secretary.

P.-C. G. J.

George B. McGinty, Secretary.

In reply please refer to File No. 724178.

Washington, January 27, 1914.

Mr. Henry Wolf Bikle,
Assistant General Solicitor,
The Pennsylvania Railroad Company,
Philadelphia, Pennsylvania.

DEAR SIR:

Replying to your communication of the 10th instant, relative to demurrage charges on certain shipments of coal consigned to Philadelphia, you are advised that my letter of November 13, 1913, second paragraph, should have read:

"From examination of this claim it appears that upon the facts stated there is no basis for cancellation of demurrage in question."

In other words, the demurrage lawfully accrued and should be collected.

Respectfully,

G. B. MCGINTY,
Secretary.

Received January 28, 1914, Legal Department.

45 In the Supreme Court of Pennsylvania for the Western District.

Court of Common Pleas, County of Allegheny, of April Term, 1917.

No. 1249.

THE PENNSYLVANIA RAILROAD COMPANY, a Corporation,

vs.

KITTANNING IRON AND STEEL MANUFACTURING COMPANY, a Corporation.

Enter Appeal on behalf of The Pennsylvania Railroad Company from the judgment of the Court of Common Pleas of the County of Allegheny.

PATTERSON, CRAWFORD & MILLER,
Attorneys for Appellant.

To George Pearson, Prothonotary of the Supreme Court of Pennsylvania for the Western District.

COUNTY OF ALLEGHENY, ss:

Edwin P. Griffiths being duly sworn, saith that the above Appeal is not intended for delay but because Appellant believes it has suffered injustice by the judgment from which it appeals.

EDWIN P. GRIFFITHS,
*Agent and Attorney for The Pennsylvania
Railroad Co., on its Behalf.*

Sworn and subscribed before me this 1st day of February A. D. 1918.

[SEAL.]

EMMA M. HALLER.

Encs.

My Commission Expires March 9, 1919.

45½

[Endorsed:]

No. 48. October Term, 1918.

Supreme Court of Pennsylvania, Western District.

The Pennsylvania Railroad Company, a Corporation,

v.

Kittanning Iron & Steel Company, a Corporation.

Appeal and Affidavit.

Filed Feb. 1-1918.

Supreme Court.

W. D.

Patterson, Crawford & Miller, Attorneys for Appellant.

46 The Supreme Court of Pennsylvania, Western District.

COUNTY OF ALLEGHENY, ss:

The Commonwealth of Pennsylvania to the Judges of the Court of Common Pleas for the County of Allegheny, Greeting:

We being willing for certain causes to be certifiel of the matter of the appeal of The Pennsylvania Railroad Company, a Corporation, from the judgment of your said Court at No. 1249 of April Term, A. D. 1917, wherein the above named appellant is plaintiff and Kittanning Iron and Steel Company, a corporation, is defendant, before you, or some of you, depending, Do Command You, that the record and proceedings aforesaid, with all things touching the same, before the Justices of our Supreme Court of Pennsylvania, at a Su-

Supreme Court to be holden at Pittsburgh, in and for the Western District, the second Monday of October 1918 so full and entire as in your Court before you they remain, you certify and send, together with this Writ that we may further cause to be done thereupon that which of right and according to the laws of the said State ought.

Witness the Honorable J. Hay Brown, Doctor of Laws, Chief Justice of our said Supreme Court at Pittsburgh, the first day of February in the year of our Lord one thousand nine hundred and eighteen.

[Seal of the Supreme Court of Pennsylvania, Western District.
1776.]

GEORGE PEARSON,
Prothonotary.

To the Honorable the Justices of the Supreme Court of the Commonwealth of Pennsylvania, sitting in and for the Western District:

The record and process, and all things touching the same, so full and entire as before us they remain, we certify and send, as within we are commanded.

J. A. EVANS. [L. S.]
— — — [L. S.]

[Endorsed:]

No. 48 of October Term, 1918.

Supreme Court.

The Pennsylvania Railroad Company, a Corporation, Appellant,

vs.

Kittanning Iron & Steel Co., a Corporation.

Certiorari to the Court of Common Pleas for the County of Allegheny.

Returnable the second Monday of October A. D. 1918.

Rule on the Appellee to appear and plead on the return Day of the Writ.

George Pearson, Prothonotary.

Filed Oct. 8, 1918.

Supreme Court.

W. D.

Patterson, Crawford & Miller, Attorneys for Appellant.

47 In the Supreme Court of Pennsylvania, Western District,
October Term, 1918.

No. 48.

THE PENNSYLVANIA RAILROAD COMPANY, a Corporation, Appellant,

v.

KITTANNING IRON & STEEL MANUFACTURING COMPANY,
a Corporation.

Appeal from Common Pleas of Allegheny County.

Filed January 4, 1919.

Per Curiam:

The judgment in this case is affirmed on the opinions of the learned court below, filed April 23 and September 14, 1917, in pursuance of which it was entered.

48

[Endorsed:]

No. 48, October Term, 1918.

The Pennsylvanit Railroad Company, a Corporation, Appellant,

v.

Kittanning Iron & Steel Manufacturing Company, a Corporation.

Appeal from C. P.

Allegheny.

Judgment Affirmed.

Per Curiam.

Filed in Supreme Court.

Jan. 4, 1919.

Philadelphia.

J. H. B.

49

COMMONWEALTH OF PENNSYLVANIA,
County of Allegheny, ss:

I, George Pearson, Prothonotary of the Supreme Court of Pennsylvania, in and for the Western District thereof, the said Court being a Court of Record, do hereby certify that the foregoing is a true and correct copy of the whole and entire opinion in the case of The Pennsylvania Railroad Company, a Corporation, Appellant, vs.

Kittanning Iron & Steel Manufacturing Company a corporation, at No. 48 October Term, 1918, as full, entire and complete as the same remains on file in said Supreme Court, in the case there stated; and I do hereby certify that the foregoing has been compared by me with the original record in said cause in my keeping and custody as the Prothonotary of said Court, and that the foregoing is a correct transcript from said record and of the whole of the original thereof.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Court, at Pittsburgh, in the County of Allegheny, in the said Western District of Pennsylvania, this 29th day of January in the year of our Lord One Thousand Nine Hundred and nineteen.

[Seal of the Supreme Court of Pennsylvania, Western District.
1776.]

GEORGE PEARSON,
Prothonotary.

[Endorsed:]

No. 48, October Term, 1918.

The Pennsylvania Railroad Company, a Corporation, Appellant,
vs.

Kittanning Iron & Steel Company, a Corporation.

Exemplification.

50 In the Supreme Court of Pennsylvania, Western District,
October Term, 1918.

No. 48.

THE PENNSYLVANIA RAILROAD COMPANY, a Corporation, Appellant,
v.

KITTANNING IRON & STEEL MANUFACTURING COMPANY.

Appeal from the Court of Common Pleas of Allegheny Co.

January 13, 1919.

It is ordered that the record in the above case be held for sixty days, Pending an application by the appellant for a writ of error to the Supreme Court of the United States.

PER CURIAM,
BROWN, C. J.

[Endorsed:]

No. 48, October Term, 1918.

The Pennsylvania Railroad Company, Appellant,

v.

Kittanning Iron & Steel Co.

Order to Hold Record.

Filed Jan. 14, 1919.

Supreme Court.

W. D.

51 In the Supreme Court of Pennsylvania, Western District.

Docket Entries.

THE PENNSYLVANIA RAILROAD COMPANY, a Corporation, Appellant,

v.

KITTANNING IRON & STEEL COMPANY, a Corporation.

Patterson, Crawford & Miller.

48.

Appeal from the Court of Common Pleas of Allegheny County
at No. 1249 of April Term, 1917.

Appeal and affidavit filed and Writ exit February 1, 1918.

September 21, 1918.—Assignments filed.

October 8, 1918.—Record filed.

October 18, 1918.—Argued.

January 4, 1919.—The judgment is affirmed.

PER CURIAM.

January 13, 1919.—It is ordered that the record in the above case be held for sixty days, pending an application by the appellant for a writ of error to the Supreme Court of the United States.

PER CURIAM,

BROWN, C. J.

52

Certificate of Record.

COMMONWEALTH OF PENNSYLVANIA,

County of Allegheny, ss:

I, George Pearson, Prothonotary of The Supreme Court of Pennsylvania, for the Western District thereof, do hereby certify that the

foregoing Record, pages 1 to — inclusive, is a true and faithful copy of the Record and Proceedings of The Supreme Court of Pennsylvania, in the Western District aforesaid, in a certain suit therein pending, wherein The Pennsylvania Railroad Company, a Corporation, is appellant and Kittanning Iron and Steel Company, a Corporation is appellee.

In testimony whereof I have hereunto set my hand and affixed the Seal of the said The Supreme Court of Pennsylvania, in and for the Western District, at Pittsburgh, this 29th day of January in the year of — Lord one thousand nine hundred and nineteen.

[seal of the Supreme Court of Pennsylvania, Western District.
1776.]

GEORGE PEARSON,
Prothonotary.

53 I, J. Hay Brown, Chief Justice of The Supreme Court of Pennsylvania, do certify, that George Pearson was at the time of signing the annexed attestation and now is Prothonotary of the said The Supreme Court of Pennsylvania, in and for the Western District, to whose acts as such full faith and credit are and ought to be given; and that the said attestation is in due form.

In Witness Whereof, I have hereunto subscribed my name this 29th day of January in the year of our Lord one thousand nine hundred and nineteen.

J. HAY BROWN.

I, George Pearson, Prothonotary of The Supreme Court of Pennsylvania in and for the Western District, do certify, that the Honorable J. Hay Brown by whom the foregoing Certificate was made and given, was at the time of making and giving the same and is now Chief Justice of The Supreme Court of Pennsylvania; to whose acts as such full faith and credit are and ought to be given, as well in Courts of Judicature as elsewhere; and that his signature, thereto subscribed, is genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of the said The Supreme Court of Pennsylvania, in and for the Western District, at Pittsburgh, this 29th day of January in the year of our Lord one thousand nine hundred and nineteen.

[Seal of the Supreme Court of Pennsylvania, Western District.
1776.]

GEORGE PEARSON.

54 UNITED STATES OF AMERICA, *ss.*:

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Pennsylvania Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which the Pennsylvania Railroad Company is appellant, and Kittanning Iron & Steel Manufacturing Company is appellee, No. 48, October Term, 1918, which suit was removed into the said Supreme Court by virtue of an appeal from the Court of Common Pleas of Allegheny County, Pennsylvania, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Supreme Court and removed into

the Supreme Court of the United States, do hereby command
55 you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the thirteenth day of March, in the year of our Lord one thousand nine hundred and nineteen.

JAMES D. MAHER,

Clerk of the Supreme Court of the United States.

[Endorsed:]

File No. 26,949.

Supreme Court of the United States,

No. 863, October Term, 1918.

The Pennsylvania Railroad Company

vs.

Kittanning Iron and Steel Manufacturing Company.

Writ of Certiorari.

56 Supreme Court of the State of Pennsylvania, October Term,
1918.

No. 48.

PENNSYLVANIA RAILROAD COMPANY

VS.

KITTANNING IRON & STEEL MANUFACTURING CO.

Stipulation.

The Supreme Court of the United States having issued a writ of certiorari in the above entitled case, it is this 21 day of March A. D. 1919, stipulated and agreed by counsel for the respective parties that the certified transcript of record now on file in the Supreme Court of the United States in the case of The Pennsylvania Railroad Company, petitioner, v. Kittanning Iron & Steel Manufacturing Company, respondent, No. 863 of October Term 1918, shall be adopted and considered as the transcript of record filed in obedience to said writ of certiorari.

It is further stipulated and agreed that the Prothonotary of the Supreme Court of the State of Pennsylvania may attach to said original writ of certiorari a certified copy of this stipulation and that said writ, with said certified copy attached, may be accepted and considered as full compliance with the terms of the writ of certiorari itself.

HENRY WOLF BIKLE,

F. D. MCKENNEY,

Attorneys for Petitioner.

R. L. RALSTON,

Attorney for Respondent.

57 COMMONWEALTH OF PENNSYLVANIA,
County of Allegheny, ss:

I, George Pearson, Prothonotary of the Supreme Court of Pennsylvania, in and for the Western District thereof, the said Court being a Court of Record, do hereby certify that the foregoing is a true and correct copy of the whole and entire stipulation in the case of Pennsylvania Railroad Company vs. Kittanning Iron & Steel Mfg. Co. at No. 48 October Term, 1918 as full, entire and complete as the same remains on file in the said Supreme Court, in the case there stated; and I do hereby further certify that the foregoing has been compared by me with the original record in said cause in my keeping and custody as the Prothonotary of said Court, and that the foregoing is a correct transcript from said record and of the whole of the original thereof.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Court, at Pittsburgh, in the County of Allegheny, in the said Western District of Pennsylvania, this 25th day of April in the year of our Lord One Thousand Nine Hundred and nineteen.

[Seal of the Supreme Court of Pennsylvania, Western District.
1776.]

GEORGE PEARSON,
Prothonotary.

58

[Endorsed:]

File No. 26,949.

Supreme Court U. S., October Term, 1918.

Term No. 863.

The Pennsylvania Railroad Co., Petitioner,

vs.

Kittanning Iron & Steel Manufacturing Co.

Writ of certiorari and return.

Filed May 5, 1919.

(451)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918.

No.

THE PENNSYLVANIA RAILROAD COM-
PANY, PETITIONER,

vs.

KITTANNING IRON AND STEEL MANU-
FACTURING COMPANY.

PETITION UNDER PROVISIONS OF SECTION 237 OF
THE JUDICIAL CODE AS AMENDED BY ACT OF SEP-
TEMBER 6, 1916 (39 STATS., 726), FOR WRIT OF
CERTIORARI TO THE SUPREME COURT OF PENN-
SYLVANIA.

*To the Honorable the Supreme Court of the United
States:*

Comes now The Pennsylvania Railroad Com-
pany, petitioner, respectfully representing that it
is aggrieved by a final judgment of the Supreme
Court of Pennsylvania, Western District, passed

and entered on the 4th day of January, A. D. 1919, in a certain cause then pending, wherein your petitioner, The Pennsylvania Railroad Company, was appellant and the Kittanning Iron and Steel Manufacturing Company was appellee, being No. 48 of the October term, 1918, of said court; that the matters at issue in said cause are of peculiar gravity and importance, in that they involve the right of your petitioner (and indirectly the right of other interstate common carriers by railroad similarly situated) to collect from said appellee (and other consignees in like circumstances) certain demurrage charges which, as is alleged and firmly believed by petitioner, have accrued and become due and payable under the terms and conditions prescribed in tariff schedules duly published and filed with the Interstate Commerce Commission as required by the laws of the United States, particularly by the act of Congress of February 4, 1887, and amendments thereof and supplementary thereto, commonly called and referred to as the Act to Regulate Commerce; that the judgment of said Supreme Court of Pennsylvania here complained of is contrary to a certain ruling of the said Interstate Commerce Commission made January 27, 1914 (File No. 724,178), applying said tariff schedules to a case and state of facts in all respects similar to and consonant with those in the case now here sought to be brought under review, and that many

other like claims for demurrage have accrued in favor of your petitioner against other consignees, payment of which has been refused upon the grounds upheld in and by the opinions and judgment of the Supreme Court of Pennsylvania in the instant case. Wherefore, in order that petitioner may be correctly advised both as to its rights and duties in the premises, and in order that the ruling of the Interstate Commerce Commission declaring that

“There is no basis for cancellation of demurrage” in such cases, thereby plainly indicating the obligation and duty of petitioner to collect the same, and the opinion and judgment of the Supreme Court of Pennsylvania declaring that

“Demurrage shall not be collected ‘when shipments are frozen while in transit,’ ” and “that the defendant is entitled to credit for all the cars containing frozen ore which it was unable to unload within the free time with the facilities which it had,”

may be either reconciled or the true rule of conduct prescribed by said Act to Regulate Commerce and the Tariffs and Car Demurrage Rules on file with the Interstate Commerce Commission may be authoritatively ascertained and declared, petitioner prays the issuance of certiorari herein as provided by law.

The particular facts and grounds upon which this application is based are as follows:

During the period November 1, 1912, to April 30, 1913, petitioner had in effect duly printed, published, and on file with the Interstate Commerce Commission two certain tariffs, known as "CAR DEMURRAGE RULES" and officially designated as T. D., I. C. C., Nos. 48 and 50, the latter superseding the former, the particular provisions of each out of which the issue here involved arose being identical, such provisions, or so much thereof as is material, reading as follows:

RULE 2, SECTION A. Forty-eight hours (two days) free time will be allowed for loading or unloading on all commodities.

* * * * *

RULE 7. DEMURRAGE CHARGE.—After the expiration of the free time allowed a charge of \$1.00 per car per day, or fraction of a day, will be made until car is released.

RULE 8. CLAIMS.—No demurrage charges shall be collected under these rules for detention of cars through causes named below. Demurrage charges assessed or collected under such conditions shall be promptly cancelled or refunded by the railroad company.

SECTION A. WEATHER INTERFERENCE.—

1. * * *

2. When shipments are frozen while in transit so as to prevent unloading during the prescribed free time.—This exemption shall not include shipments which are tendered to consignee in condition to unload.

Under this rule consignees will be required to make diligent effort to unload such shipments.

* * * * *

SECTION B. BUNCHING.

1. * * *

2. Cars for unloading or reconsigning.—When, as the result of the act or neglect of any carrier, cars destined for one consignee, at one point, are bunched * * * at destination and delivered by the railroad company in accumulated numbers in excess of daily shipments, the consignee shall be allowed such free time as he would have been entitled to had the cars been delivered in accordance with the daily rate of shipment. Claim to be presented to railroad company's agent within fifteen (15) days.

RULE 9. AVERAGE AGREEMENT.—When a shipper or receiver enters into the following agreement, the charge for detention to cars, provided for by Rule 7, on all cars held for loading or unloading by such shipper or receiver shall be computed on the basis of the average time of detention to all such cars released during each calendar month, such average detention to be computed as follows:

SECTION A. A credit of one day will be allowed for each car released within the first twenty-four hours of free time. A debit of one day will be charged for each twenty-four hours or fraction thereof that a car is detained beyond the first forty-eight hours of free time. In no case shall more than

one day's credit be allowed on any one car, and in no case shall more than five (5) days' credit be applied in cancellation of debits accruing on any car, making a maximum of seven (7) days that any car may be held free; this to include Sundays and holidays.

SECTION B. At the end of the calendar month the total number of days credited will be deducted from the total number of days debited, and \$1.00 per day charged for the remainder. If the credits equal or exceed the debits, no charge will be made for the detention of the cars, and no payment will be made to shippers or receivers on account of such excess of credits, nor shall the credits in excess of the debits of any one month be considered in computing the average detention for another month.

SECTION C. A shipper or receiver who elects to take advantage of this average agreement shall not be entitled to cancellation or refund of demurrage charges under section A, paragraphs 1 and 3, or section B of Rule 8.

* * * * *

Prior to the period (November 1, 1912-April 30, 1913) in question your petitioner and the Kittanning Iron and Steel Manufacturing Company had entered into the AVERAGE DEMURRAGE AGREEMENT provided for in rule 9, above, and same was in full force throughout said period.

Throughout said period said manufacturing company had in use at its plant at destination a

device for "steaming" cars of frozen ore, by the use of which it was possible, with diligent effort, to unload not more than five car-loads of frozen ore each day.

During the month of December, 1912, and the months of February and March, 1913, all of which were included in said period, your petitioner placed on the appropriate interchange tracks for unloading numerous cars consigned to said manufacturing company, loaded with ore which had become frozen in transit. Each and every of said car-load shipments was an interstate shipment, subject in all respects to the tariff rules respecting demurrage charges above set forth.

Upon each of such shipments, under the provisions of said car demurrage rules, and particularly the provisions of the so-called Average Demurrage Agreement (rule 9), demurrage accrued due from said manufacturing company to your petitioner in the aggregate sum of \$1,209.00.

With respect to the cars upon which such demurrage charges became due and payable, it was agreed (the issues were submitted to the State courts upon an agreed case stated) that no claim for allowance (of further free time) on account of "bunching" had been presented to your petitioner within fifteen (15) days after the date on which the demurrage bill covering said cars of frozen ore was presented.

Notwithstanding all of the above, the verity of which is in no respect questioned, the learned Court of Common Pleas of Allegheny County, Pennsylvania, upon action brought by your petitioner before it to recover said demurrage charges, gave its judgment in favor of the defendant manufacturing company, saying (Opinion, Record, p. 34) :

It is admitted that the ore was frozen when delivered; that by diligent effort on the part of the Steel Company it was able to unload ten cars of the ore within the free time of forty-eight hours. But the Railroad Company claims that, first, by reason of the Steel Company taking advantage of what is known as the Average Agreement, it was not entitled to take advantage of the Bunching rule, *i. e.*, the rule which applied to cars that were bunched by the Railroad Company either at the place of shipment, en route, or at the place of consignment. And, second, that the rule above quoted applies to but one car, and that if the Steel Company had facilities for unloading one car of frozen ore within the free time of forty-eight hours it must pay demurrage on all the cars delivered to it which it failed to unload within that time.

As to the first contention, it was not the bunching of the cars which prevented the Steel Company from unloading the cars within the free time limit. If the ore had not been frozen the facilities of the defendant for unloading the cars would have taken care of all the cars delivered, and therefore it was the freezing of the cars and

not the bunching of the cars which was the cause of the delay.

As to the second contention of the Railroad Company, notwithstanding the very curt opinion of the Secretary of the Interstate Commerce Commission, I am unable to give the interpretation to that rule contended for by the Railroad Company. Demurrage shall not be collected "when shipments are frozen while in transit." A shipment is a consignment as delivered by the Railroad Company, be it one car or one hundred cars, and there is nothing in the averment of facts to justify the contention that the number of cars delivered at any one time during the period for which this demurrage is charged was due to the bunching of shipments either at the place of shipment, en route, or at the place of delivery.

The "very curt opinion" of the Interstate Commerce Commission referred to is an unreported opinion of said Commission, evidenced by and appearing in the transcript of record filed herewith, as follows:

"Interstate Commerce Commission.

October 18, 1913.

Claim of P., B. & W. R. R. Co. against Terminal Coal Co.

Demurrage, \$62.00.

The Interstate Commerce Commission, Sun Building, Washington, D. C.

GENTLEMEN: On behalf of the Philadelphia, Baltimore & Washington Railroad Company, as well as on behalf of the Ter-

minal Coal Company, I am transmitting herewith the papers having reference to the above claim, to which we ask leave to invite the attention of the Commission.

* * * * *

As will be observed, the coal which constituted the subject-matter of the shipment arrived at destination in a frozen condition, and this condition interfered with the unloading, although any single car might have been unloaded within the free time accorded by the demurrage rules.

It is the railroad's contention and belief that the demurrage must be assessed with regard to the individual cars, and that, since any single car might have been unloaded in the free time accorded in spite of the condition of the lading, the demurrage has been properly assessed. On the other hand, it is the contention and belief of the Terminal Coal Company that, since the cars arrived at or about the same time, and that since the time expended in unloading certain cars prevented it from giving attention to the other cars, which were accordingly constructively placed—the frozen condition of the lading is what really caused the assessment of the demurrage, and that the charges should be cancelled under the provisions of rule 8 of the demurrage rules.

As will be observed, this file has already had the attention of the Pennsylvania State Railroad Commission. In the opinion of that body the charges should be cancelled; but as all the cars except one moved in inter-

state commerce, having passed en route outside the State of Pennsylvania, although originating in and delivered in Pennsylvania, we deem it proper to submit the matter to your honorable tribunal for its views in the premises.

In view of the fact that the real question is one of tariff construction, or, in other words, since the real question is whether or not the claim is due, the rule of the Commission requiring the payment of charges as a condition precedent to its consideration of such claims apparently does not apply.

A copy of this letter has been submitted to the Coal Company and approved by it, and it joins with the Railroad Company in hoping that the Commission will express its views in the premises, so that the controversy may be properly and lawfully adjusted.

Very respectfully,

HENRY WOLF BIKLE,

Assistant General Solicitor.

C. F. P. Enc.

Office of the Secretary.

P., C. G. J.

George B. McGinty, Secretary.

In reply please refer to File No. 724,178.

WASHINGTON, January 27, 1914.

Mr. Henry Wolf Bikle, Assistant General Solicitor, The Pennsylvania Railroad Company, Philadelphia, Pennsylvania.

DEAR SIR: Replying to your communication of the 10th instant, relative to demurrage charges on certain shipments of coal consigned to Philadelphia, * * * From examination of this claim it appears that upon the facts stated there is no basis for cancellation of demurrage in question.

In other words, the demurrage lawfully accrued and should be collected.

Respectfully,

G. B. MCGINTY,
Secretary.

From the judgment entered pursuant to said opinion of said Court of Common Pleas of Allegheny County, your petitioner appealed to the Supreme Court of Pennsylvania; which court, after hearing, affirmed said judgment "on the opinions of the court below," without more.

Your petitioner represents that under said tariff provisions and rules duly published and filed as

aforsaid, and under said ruling of the Interstate Commerce Commission, it is entitled to receive and is in duty bound to collect from said manufacturing company the demurrage charges sued for; and, further, that the concurring judgments of the two State courts in the premises are erroneous and in effect nullify in part applicable provisions of the Act to Regulate Commerce and negative the tariff provisions and rules above quoted, published, and filed in pursuance thereof.

Petitioner further represents that the claim sued upon is but one of a large number of similar claims, in which the demurrage charges accrued due to it alone (there being other interstate carriers in like circumstances) exceed the sum of \$250,000.

Wherefore, by reason of the conflict apparent between the courts of the State of Pennsylvania and the Interstate Commerce Commission, which latter is especially charged by law with the duty of construing and enforcing observance of and compliance with tariff schedules and tariff rules, including "Car Demurrage Rules," on file with it; and, further, because and by reason of general interest in and the general importance of the issues involved, and in order to induce uniformity of decision in this matter of Federal import, your petitioner prays that writ of certiorari to review the cause be issued to said Supreme Court of Pennsyl-

vania, as in such case is provided by law (section 237, Judicial Code, as amended by the act of September 6, 1916; 39 Stats., 726).

THE PENNSYLVANIA RAIL-
ROAD COMPANY,
By HENRY WOLF BIKLE,
FREDERIC D. McKENNEY,
Its Attorneys.

NOTICE.

*To the Kittanning Iron and Steel Manufacturing
Company and
R. L. Ralston, Esq., Attorney of Record.*

Take notice that on Monday, March 3d, 1919, at 12 o'clock noon, the above petition for certiorari will be submitted to the Supreme Court of the United States for its consideration and action.

HENRY WOLF BIKLE,
FREDERIC D. McKENNEY,
Attorneys for Petitioner.

Service acknowledged this — day of February,
A. D. 1919.

— — —,
*Attorney for Kittanning Iron and
Steel Manufacturing Co.*

FEB 28 1920

JAMES D. MAHER,
CLERK

No. 301.

OCTOBER TERM, 1919.

IN THE
Supreme Court of the United States

THE PENNSYLVANIA RAILROAD COMPANY, Petitioner,

VS.

KITTANNING IRON AND STEEL MANUFACTURING
COMPANY.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF
THE COMMONWEALTH OF PENNSYLVANIA.

BRIEF FOR PETITIONER.

HENRY WOLF BIKLÉ,
FREDERIC D. MCKENNEY,

For Petitioner.

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In the Supreme Court of the United States.

OCTOBER TERM, 1919. No. 301.

The Pennsylvania Railroad Company, Petitioner,

vs.

Kittanning Iron & Steel Manufacturing Company.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE
COMMONWEALTH OF PENNSYLVANIA.

BRIEF FOR PETITIONER.

I. STATEMENT OF THE CASE.

The Pennsylvania Railroad Company, the petitioner, hereinafter called the Railroad Company, instituted an action in the Court of Common Pleas of Allegheny County, Pennsylvania, No. 1249 of April Term, 1917, to recover from the Kittanning Iron & Steel Manufacturing Company, the Respondent, hereinafter called the Steel Company, demurrage charges aggregating \$4029. assessed on certain shipments of ore consigned to the Steel Company at Kittan-

ning, Pennsylvania, from points without the State of Pennsylvania.

There is no dispute as to the Railroad Company's right to recover a portion of the amount sued for; but as to the balance, viz., \$1209.00 the Steel Company has defended on the ground that to this extent the charges were not properly assessed under the tariff of the Railroad Company lawfully on file with the Interstate Commerce Commission; and the trial court and the Supreme Court of the Commonwealth sustained this contention notwithstanding a ruling by the Interstate Commerce Commission sustaining the Railroad Company's interpretation of the rule. The Railroad Company applied for and was granted a writ of *certiorari* whereby the case comes here.

The controversy with respect to the amount in dispute arises as follows:—

During the period, November 1, 1912, to April 30, 1913, the Railroad Company had in effect duly printed, published and on file with the Interstate Commerce Commission two certain tariffs known as "Car Demurrage Rules," officially designated T. D.—I. C. C.—Nos. 48 and 50, the latter superseding the former January 1, 1913, the particular provisions of each, out of which the issue here involved arose, being identical.* The material provisions of these rules read as follows:

"RULE 2, SECTION A. Forty-eight hours (two days) free time will be allowed for loading or unloading on all commodities.

* * * * *

"RULE 7. DEMURRAGE CHARGE.—After the expiration of the free time allowed a charge of \$1.00 per car per day, or fraction of a day, will be made until car is released.

RULE 8. CLAIMS.—No demurrage charges shall be collected under these rules for detention of cars through causes named below. Demurrage charges assessed or

* These tariffs are set forth in the record *in extenso*, pages 5-20.

collected under such conditions shall be promptly cancelled or refunded by the railroad company.

"SECTION A. WEATHER INTERFERENCE.—

"1. * * *

"2. When shipments are frozen while in transit so as to prevent unloading during the prescribed free time. —This exemption shall not include shipments which are tendered to consignee in condition to unload. Under this rule consignees will be required to make diligent effort to unload such shipments.

* * * * *

"SECTION B. BUNCHING.

"1. * * *

"2. Cars for unloading or reconsigning. When, as the result of the act or neglect of any carrier, cars destined for one consignee, at one point, are bunched * * * at destination and delivered by the railroad company in accumulated numbers in excess of daily shipments, the consignee shall be allowed such free time as he would have been entitled to had the cars been delivered in accordance with the daily rate of shipment. Claim to be presented to railroad company's agent within fifteen (15) days.

"RULE 9. AVERAGE AGREEMENT.—When a shipper or receiver enters into the following agreement, the charge for detention of cars, provided for by Rule 7, on all cars held for loading or unloading by such shipper or receiver shall be computed on the basis of the average time of detention to all such cars released during each calendar month, such average detention to be computed as follows:

"SECTION A. A credit of one day will be allowed for each car released within the first twenty-four hours of free time. A debit of one day will be charged for each twenty-four hours or fraction thereof that a car is detained beyond the first forty-eight hours of free time. In no case shall more than one day's credit be allowed on any one car, and in no case shall more than five (5)

days' credit be applied in cancellation of debits accruing on any car, making a maximum of seven (7) days that any car may be held free; this to include Sundays and holidays.

"SECTION B. At the end of the calendar month the total number of days credited will be deducted from the total number of days debited, and \$1.00 per day charged for the remainder. If the credits equal or exceed the debits, no charge will be made for the detention of cars, and no payment will be made to shippers or receivers on account of such excess of credits, nor shall the credits in excess of the debits of any one month be considered in computing the average detention for another month.

"SECTION C. A shipper or receiver who elects to take advantage of this average agreement shall not be entitled to cancellation or refund of demurrage charges under section A, paragraphs 1 and 3, or section B of Rule 8."

Prior to the period (November 1, 1912—April 30, 1913) the Steel Company had entered into the "Average Demurrage Agreement" provided for in rule 9, above, and the same was in full force throughout the period (Record, page 3).

During the period the Steel Company had at its plant a device for "steaming" cars of frozen ore, by means of which it was possible for the Steel Company, by using diligent effort, to unload not more than five carloads of frozen ore each day (Record, page 4).

During the month of December, 1912, and the months of February and March, 1913, all of which were included in the said period, the Railroad Company placed on the appropriate interchange tracks of the Steel Company for unloading certain cars consigned to the said Steel Company loaded with ore which had become frozen in transit (Record, page 4). Each and every of said carload shipments was an interstate shipment (Record, page 4), subject in all respects

to the tariff rules respecting demurrage charges above set forth.

As appears by the list of cars showing in detail the deliveries of cars by days to the Steel Company (Record, page 21), on certain days more than five cars were placed upon the interchange tracks by the Railroad Company, and since these cars were not unloaded within the free time provided in the tariff, demurrage charges were assessed, which constitute the amount here in controversy.

With respect to the cars upon which such demurrage charges became due and payable, it was agreed (the issues were submitted to the State Courts upon a case stated) that "no claim for allowance [of further free time] on account of *bunching* was presented by the Steel Company to the Railroad Company" within fifteen days after the date on which the demurrage bill covering these cars of frozen ore was rendered (Record, page 5).

In this situation the trial Court refused to allow the Railroad Company to recover the charges in question from the Steel Company; but on the contrary, held that the charges did not lawfully accrue. Its reasons for its action in this regard are found in the following paragraphs excerpted from its opinion upon the whole case (Record, page 22):—

"It is admitted that the ore was frozen when delivered; that by diligent effort on the part of the Steel Company it was able to unload ten cars of the ore within the free time of forty-eight hours. But the Railroad Company claims that, first, by reason of the Steel Company taking advantage of what is known as the Average Agreement it was not entitled to take advantage of the Bunching Rule, *i. e.*, the rule which applied to cars that were bunched by the Railroad Company either at the place of shipment, enroute or at the place of consignment. And, second, that the rule above quoted applies to but one car, and that if the Steel Company had facilities for unloading one car of frozen ore within the free time of forty-eight hours it must pay demurrage on all the cars delivered to it which it failed to unload within that time.

"As to the first contention, it was not the bunching of the cars which prevented the Steel Company from unloading the cars within the free time limit. If the ore had not been frozen the facilities of the defendant for unloading the cars would have taken care of all the cars delivered, and therefore it was the freezing of the cars and not the bunching of the cars which was the cause of the delay.

"As to the second contention of the Railroad Company, notwithstanding the very curt opinion of the Secretary of the Interstate Commerce Commission, I am unable to give the interpretation to that rule contended for by the Railroad Company. Demurrage shall not be collected 'when shipments are frozen while in transit.' A shipment is a consignment as delivered by the Railroad Company, be it one car or one hundred cars, and there is nothing in the averment of facts to justify the contention that the number of cars delivered at any one time during the period for which this demurrage is charged was due to the bunching of shipments either at the place of shipment, en route or at the place of delivery."

The Supreme Court of Pennsylvania sustained the trial Court in a *per curiam* opinion, affirming the judgment below on the opinion of the trial Court (Record, page 30).

The questions presented on this record are whether the State Courts have correctly construed the word "shipments" as used in the demurrage rules, and whether these rules properly interpreted contemplate any other construction than that which individualizes the car for the purpose of applying the rules, or, to state it somewhat differently, whether a consignee is relieved from demurrage on a frozen shipment contained in a certain car, which he might have unloaded within the free time, but for the fact that his unloading facilities were diligently employed in unloading other carload shipments then present which likewise had become frozen in transit.

ASSIGNMENT OF ERROR.

Error on part of the Supreme Court of the Commonwealth of Pennsylvania in affirming so much of the opinion of the Court of Common Pleas of Allegheny County, Pennsylvania, as declared that "Demurrage shall not be collected when shipments are frozen while in transit"; that "A shipment is a consignment as delivered by the Railroad Company, be it one car or one hundred cars," and adjudging that the Railroad Company "is not entitled to recover anything for the detention of the cars placed during the months of December, February and March, in which the ore was frozen," upon which cars demurrage is claimed by the Railroad Company to be due from the Kittanning Iron and Steel Manufacturing Company in the aggregate sum of \$1209.00.

ARGUMENT.

1. The demurrage rules contemplate an individual application thereof in determining the free time to be accorded for unloading.

An examination of the demurrage rules indicates that they contemplate throughout an individual consideration of the cars to which they apply. "Forty-eight hours free time will be allowed for loading or unloading on all commodities" (Record, page 6). No one has ever contended that this rule means anything else than forty-eight hours with respect to each car. So with the "twenty-four hours free time" * * * "when cars are held for switching orders;" or "for reconsignment or reshipment in same car received, and when cars are held in transit on order of consignor or consignee" (Record, pages 6-7). The same is true with regard to all the other provisions of Rule 2 with respect to the free time allowed.

Likewise, with respect to the computation of time under Rule 3, and with respect to notification under Rule 4; while the rules use the word "cars," no one has ever contended that there is any other than an individual application of the rules to the particular and specific car involved, a fact emphasized by the rule providing the charge which reads as follows:—

"After the expiration of *the** free time allowed a charge of \$1.00 *per car per day, or portion of a day** will be made until *car** is released."

Clearly the charge is to be reckoned against a particular car, and with reference to *the* free time allowed that specific car. No suggestion of aggregation of cars for the purpose of determining the free time is suggested even remotely.

It is hard to believe, therefore, that in Rule 8, providing for "Claims," and containing the provision regarding shipments frozen in transit, any other or different interpretation can be proper. In fact, even under this rule, where consideration is given on account of bunching, the rules are still applied in an individual manner to the specific cars, but "the shipper shall be allowed such free time as he would have been entitled to had the cars been delivered in accordance with the daily rate of shipment." That is, the demurrage is assessed on each car by calculating the free time it would have had if it had arrived in accordance with the daily rate of shipment.

Furthermore, this individual application of the rules is emphasized further by Rule 9, which provides the so-called "Average Agreement" which the Steel Company had elected in this instance as the basis for the assessment of its demurrage. This average agreement provides a method of assessing demurrage whereby a shipper by special diligence in respect of certain cars may obtain so-called credits with which to offset debits on cars detained beyond the

* Italics ours.

usual free time period. But it is to be noted that the credit is "for *each car** released within the first twenty-four hours of free time"; and "a debit of one day will be charged for each twenty-four hours or fraction thereof that *a car** is detained beyond the first forty-eight hours of free time"; and "in no case shall more than one day's credit be allowed on *any one car*," and in no case shall more than five (5) days' credit be applied in cancellation of debits accruing on *any car*,* making a maximum of seven (7) days that *any car** may be held free" (Record, page 11).

The very fact that the demurrage rules include the so-called bunching rule quoted above on page 3 indicates very clearly that they are to be applied individually, and not to an aggregate of cars which arrive at a given time. And this, of course, is a well settled practice. See, for example, *American Radiator Company vs. Lehigh Valley Railroad Company*, 44 I. C. C. 361 (1917); *Pittsburgh Crucible Steel Co. vs. Pennsylvania Co.*, 41 I. C. C. 706 (1916). The point is emphasized by the decisions of the Commission which have held that if a shipment originally loaded into one car is transferred en route into two cars, the two cars should be treated as one for the purpose of demurrage: *Scudder vs. Texas Pacific R. R. Co.*, 21 I. C. C. 60 (1911); *W. O. Kay Co. vs. Denver & Rio Grande R. R. Co.*, 21 I. C. C. 239 (1911); *Roy & Roy Mill Co. vs. Boston & Maine R. R. Co.*, 44 I. C. C. 523 (1917). The very fact that in such case an exceptional practice is held proper demonstrates the universality of the practice in other cases of determining the application of the rule with respect to the individual car.

In the face of this consistent policy of the demurrage rules, the State Court has introduced in this case a totally new theory of aggregating the cars in applying the rules. The trial Court says that, "a shipment is a consignment as delivered by the Railroad Company, be it one car or one hundred cars." But the fallacy of this is readily apparent. A shipment, even in its popular sense, does not mean the

* Italics ours.

total freight tendered a given consignee by a given railroad on a given day—it means a consignment *shipped* on a given day from some given point. And there is nothing in the case to indicate that these cars of ore were shipped on any given day from any given point; nor is the decision of the State Courts based on any such theory. Clearly a “shipment” within the demurrage rules cannot mean the aggregate freight offered for delivery by a railroad to a consignee when such freight comes from sundry directions and has originated on different days. Such an interpretation would defeat the purpose of the rules.

If the trial Judge were right in his view of the meaning of the word “shipments,” the question would at once arise why the word as used in the rules is in the plural. If his definition were correct, the word “shipment” would be the proper word to use, since this would include all the cars arriving on a given day. The very fact that the singular is not used indicates that, as in the case of the other rules, the cars are to be treated individually with reference to the computation of the free time and the assessment of the demurrage.

There is a very simple explanation of the use of this word “shipments” in the rule. *It is not the car that freezes,—it is the shipment in the car.* Hence in this rule it was necessary to vary from the phraseology of the other rules, which constantly refer to cars, and to speak of “shipments”; but there is not the slightest indication of an intention to depart from the consistent policy of the framers of the rules to deal with the cars individually in determining their application.

The simple question then is whether, under a rule providing that no demurrage charges shall be collected “when shipments are frozen while in transit so as to ~~prevent~~ unloading during the prescribed free time,” a consignee is relieved from demurrage with respect to a given car because, although it is entirely possible for him to unload that car within the free time, he neglects to do so, and devotes his attention to other cars or, for that matter, to something else.

Here it is admitted that the Steel Company could have unloaded five cars of this frozen ore per day—ten cars within

the forty-eight hours of free time allowed; but it claims that because on certain days more than ten cars arrived, it should not pay any demurrage on the balance, not because it could not have unloaded any one of them, or, for that matter, any ten of them, but because it could not unload such balance in view of the attention which it gave to the ten to which it decided to devote its efforts.

But this is not what the rule provides. If the car can be unloaded within the free time, there is no basis for the contention that demurrage does not accrue because the consignee gives attention to other cars awaiting unloading. The Interstate Commerce Commission has ruled on the identical question. This appears in the unreported decision of that tribunal set forth at length in the Record, page 25. It is as follows:—

“Unreported Decision of Interstate Commerce Commission.

“OCTOBER 18th, 1913.

“CLAIM OF P., B. & W. R. R. CO. AGAINST TERMINAL COAL CO.

“Demurrage \$62.00.

“*The Interstate Commerce Commission, Sun Building, Washington, D. C.*

“GENTLEMEN :—On behalf of the Philadelphia, Baltimore & Washington Railroad Company, as well as on behalf of the Terminal Coal Company, I am transmitting herewith the papers having reference to the above claim, to which we ask leave to invite the attention of the Commission.

“The facts in the matter are fully developed in the file, and in particular in the letters of Auditor Kraft, dated May 2nd, 1913, and July 26th, 1913.

“As will be observed, the coal which constituted the subject matter of the shipment, arrived at destination in a frozen condition and this condition interfered with the unloading, although any single car might have been unloaded within the free time according by the demurrage rules.

"It is the Railroad's contention and belief that the demurrage must be assessed with regard to the individual cars, and that, since any single car might have been unloaded in the free time accorded in spite of the condition of the lading, the demurrage has been properly assessed. On the other hand, it is the contention and belief of the Terminal Coal Company that, since the cars arrived at or about the same time and that, since the time expended in unloading certain cars prevented it from giving attention to the other cars which were accordingly constructively placed—the frozen condition of the lading is what really caused the assessment of the demurrage, and that the charges should be cancelled under the provisions of Rule 8 of the demurrage rules.

"As will be observed, this file has already had the attention of the Pennsylvania State Railroad Commission. In the opinion of that body the charges should be cancelled; but as all the cars except one moved in interstate commerce, having passed enroute outside the State of Pennsylvania, although originating in and delivered in Pennsylvania, we deem it proper to submit the matter to your honorable tribunal for its views in the premises.

"In view of the fact that the real question is one of tariff construction, or, in other words, since the real question is whether or not the claim is due, the rule of the Commission requiring the payment of charges as a condition precedent to its consideration of such claims, apparently does not apply.

"A copy of this letter has been submitted to the Coal Company and approved by it, and it joins with the Railroad Company in hoping that the Commission will express its views in the premises, so that the controversy may be properly and lawfully adjusted.

"Very respectfully,

"HENRY WOLF BIKLÉ,

"Assistant General Solicitor.

"C. F. P.

"Enc.

"INTERSTATE COMMERCE COMMISSION

"Office of the Secretary.

"George B. McGinty, Secretary. H. C. W.-T. J. M.

"WASHINGTON, November 13, 1913.

"In reply refer to File No. 724178.

"*Mr. Henry Wolf Bikle, Assistant General Solicitor,
Pennsylvania Railroad Company, Philadelphia, Penn-
sylvania.*

"DEAR SIR:—Replying to your letter of October 18th, and returning papers relating to claim of the P. B. & W. R. R. Co., against the Terminal Coal Company for demurrage charges on certain shipments of coal consigned to Philadelphia, Pennsylvania:

"From examination of this claim it appears that upon the facts stated there is no basis for refund.

"Respectfully,

"G. B. MCGINTY,

"Secretary.

"Received November 17, 1913, Legal Department.

"INTERSTATE COMMERCE COMMISSION

"Office of the Secretary.

"George B. McGinty, Secretary. P.-C. G. J.

"In reply please refer to File No. 724178.

"WASHINGTON, January 27, 1914.

"*Mr. Henry Wolf Bikle, Assistant General Solicitor,
The Pennsylvania Railroad Company, Philadelphia,
Pennsylvania.*

"DEAR SIR:—Replying to your communication of the 10th instant, relative to demurrage charges on certain shipments of coal consigned to Philadelphia, you are advised that my letter of November 13, 1913, second paragraph, should have read:

"From examination of this claim it appears that upon the facts stated there is no basis for cancellation of demurrage in question."

"In other words, the demurrage lawfully accrued and should be collected.

"Respectfully,

"G. B. MCGINTY,

"Secretary.

"Received January 28, 1914, Legal Department."

The trial Court characterizes the opinion as "very curt," but it is to be noted that it is based upon a full statement of a case identical in its essential facts with the case here presented. And it gains added force from the following considerations:

(a) The tariff under which these demurrage charges have been assessed is a tariff based upon the so-called code of uniform rules promulgated and recommended by the Interstate Commerce Commission in 1909.*

* For a history of the demurrage rules, see

Interstate Commerce Commission Conference Rulings, Bulletin No. 7, Nos. 242, 313; also pamphlet entitled "Proposed Explanations to the National Car Demurrage Rules," issued by the Commission under date of April 11, 1912; pamphlet entitled "National Car Demurrage Rules and Explanations," issued by Interstate Commerce Commission under date of June 3, 1912; pamphlet entitled "Amendments to National Car Demurrage Rules," issued by Interstate Commerce Commission under date of January 7, 1913; and Code of National Car Demurrage Rules endorsed by the Commission January 17, 1916. The Interstate Commerce Commission itself has pointed out the fact that the uniform demurrage rules were not prepared by the railroads, but by a Committee of the National Association of Railway Commissioners composed of a representative of each State that had a Railway Commission and a member of the Interstate Commerce Commission: *Alon Wood Iron & Steel Co. vs. P. R. R. Co., et al*, 24 I. C. C. 27 (1912).

It seems proper to note also that the Committee which framed the rules had apparently little sympathy with exemptions resulting from weather conditions. Dealing with this subject, the Committee says, on page 29 of the pamphlet above referred to:

"While we regard the 'weather rule' as legally sound, and are convinced that its omission from the code would entail severe hardship, especially upon the more northern states, we yet confess to an entire lack of enthusiasm for it. We cannot blind ourselves to the fact that the 'weather rule' and its fellow, the 'bunching rule,' lend themselves peculiarly to gross abuses. They are employed constantly as pretexts for exempting favored industries from demur-

Since that time, as will appear from a comparison of the rules with the code as then promulgated, minor changes have been made, but these changes have in practically every instance been brought about after extended conferences between shippers, carriers and representatives of the Interstate Commerce Commission. In fact, the specific rule involved in this case has the express sanction of the Commission. (See Bulletin published by Interstate Commerce Commission in June, 1912, entitled, "National Car Demurrage Rules and Explanations.") The rules should there-

rage generally. The small shipper who clamors most insistently for a broad-gauge 'weather rule' and an equally liberal 'bunching rule' does not realize that he is merely playing the game of his powerful rival. He may save a dollar or two for himself, but the big industry uses the rules as a means of forcing almost unbelievable concessions from tractable railroads. The general public does not appreciate the power wielded over carriers in competitive territory by industries which control a large tonnage. We have in mind a dispute between a carrier and a shipper over a demurrage bill amounting to a very few dollars. The shipper demanded the cancellation of the entire charge; the carrier remitted a portion of the amount, but contended that any further reduction would violate the law. By way of revenge for the carrier's resolute stand the industry diverted its immense tonnage to a competing railroad. In another instance demurrage charges accrued against a great industry in the amount of some \$150,000. Payment being resisted, the carrier finally agreed to cancel the entire charge. This was effected by arbitrarily accrediting part of the amount to 'weather interference' and the remainder to 'bunching.' These are not isolated cases; an unscrupulous industrial traffic manager and a dishonest railroad official need nothing more than wide-open demurrage rules in order to set at naught the law's prohibitions against discrimination. Unfortunately this manipulation can not always be readily detected or punished, the chief obstacle being the impossibility of framing a 'weather rule' which can be applied with mathematical precision. Discretion must always enter in. Many rules which were urged upon the committee were summarily rejected because giving unrestricted play to the discretionary element. Take, for example, the following:

Weather interference within the prescribed free time.

When investigation shows that weather conditions during the free time allowed actually interfere with the unloading of a car or cars.

"It is hardly necessary to state that these provisions are so elastic that they mean everything or nothing according as one may desire. The point which we are making is further illustrated by the following proposed additions to the rules:

Reasonable allowance will be made in cases of strikes, fire, floods, quarantine, breakdown of machinery, or other conditions beyond control, the allowance to be made after investigation and

fore be interpreted in accordance with the views of that Commission just as the views of a Commission charged with the enforcement of a statute are regarded as entitled to special weight with respect to its proper interpretation. *New Haven, etc., Railroad vs. Interstate Commerce Commission*, 200 U. S. 361, at page 401 (1906); *Logan vs. Davis*, 233 U. S. 613, at page 627 (1914). See also *Texas & Pacific Railway Company vs. American Tie Company*, 234 U. S. 138 (1914), as to the importance of the Commission's interpretation of tariffs.

(b) The fact that the rule is contained in a code promulgated and recommended by the Interstate Commerce Commission effectually disposes of any suggestion that it should be interpreted against the Railroad Company, or otherwise than is consistent with the primary purpose of all demurrage rules, viz., the increase of car efficiency in the interest of the general public.

Facts very similar to those presented in the case at bar were involved in the case of the *Central Pennsylvania Lumber Co. vs. Railroads*, 53 I. C. C. 523 (1919). In that case the complainant assailed demurrage charges collected for the detention of certain cars during a period when weather was claimed to have interfered with the loading.

in accord with the actual conditions surrounding, inclusive of diligent effort on the part of the consignee or consignor to release the cars; the allowances, if possible, to be made in advance of payment of the charges. Where that can not be done, bills should be paid by the consignee or consignor and claims promptly made, to the end that prompt consideration may be given.

Material going into actual construction will be given consideration on the basis of assistance, provided the consignee uses all possible diligence in unloading.

"How is a 'reasonable allowance' to be determined? What is 'diligent effort'? What is meant by 'the basis of assistance'? Doubtless these provisions are advocated in all good faith, but it is self-evident that in each of them the personal equation is supreme. It were far better to abandon demurrage rules entirely than to adopt such provisions as the foregoing.

"It has been our prime concern to eliminate discretion from the rules so far as possible. We have made a particular effort to phrase the 'weather rule' so definitely that it may be applied with at least an approach to uniformity, and are convinced that its interpretation and enforcement will be a matter of no difficulty to the demurrage manager of conscience and determination. It will be observed that the rule is a fairly comprehensive one, and may reasonably be expected to meet the needs of the entire country."

The actual situation is well portrayed in the summary of the facts contained in the Commission's report, and as this is comparatively brief, it would seem permissible to insert it together with the ruling of the Commission:—

“Complainant's witness testified that because of the severity of a storm, rain, and snow, between April 8 and 12, 1918, inclusive, half of its loading crew refused to work and that with the depleted force it was impossible sooner to load the cars and secure their release. It is not contended that it was impossible to load any cars during the period referred to. A number of cars were so loaded by complainant, and it appears that some were shipped and others ordered placed each day during that time. Complainant asserts that none of its cars could have been loaded at that time if unusual efforts had not been made to induce the men to remain on duty, and, assuming that if such efforts had not been made and no cars loaded during that period, a claim for extension of the free time with respect to all the cars could have been established, complainant argues that the rules in effect penalize its diligence and are unreasonable. In this connection it is sufficient to say that the question of whether or not weather conditions are such as to prevent the employment of men in loading cars is one of fact and is not affected by shipper's diligence or lack thereof in procuring help.

“The rule in question is part of the uniform demurrage code generally in effect on the railroads of the country, and upon this record we find that it is not shown to have been or to be unreasonable or to have resulted in unreasonable demurrage charges. An order dismissing the complaint will be entered.”

It is respectfully submitted that the finding of the Commission in this recent proceeding is strictly in accord with its informal decision in the case above referred to, which, in principle, is identical with the case now before the Court.

2. No hardship results to the consignee from this construction of the rules.

Strictly, it is probably unnecessary to discuss this feature of the controversy, since, if the construction suggested by the Railroad Company is correct, resulting hardship to the consignee will not in this forum prevent the enforcement of the rule—resort must be had to the Interstate Commerce Commission if the rule is claimed to be unreasonable. And, on the other hand, it is freely conceded that, if the Railroad Company were wrong in its interpretation, absence of hardship to the consignee would not enable it to collect these charges. At the same time, the practical aspect of the situation may properly be looked into as supplying the background against which these rules should be read and providing the perspective in which they can be most accurately appraised.

The Steel Company takes the position that it should not be required to pay demurrage because of its inability, even with diligent efforts, to unload all the cars during the free time. But the significant fact remains that this situation is one over which the Steel Company has control and over which the railroad does not have control. Since the railroad, being a common carrier, is obligated to receive freight as it is offered to it, it must accept for transportation these carloads of ore as they are delivered to it. It is not within its power to regulate their volume. The consignee, on the other hand, can regulate the shipments by instructions to the consignors or other representatives of the consignee at point of shipment, and can arrange to have them forwarded in such numbers from day to day as to prevent their arriving in numbers beyond the consignee's ability to unload them.

In the absence of anything to the contrary in the case stated, it must be presumed, therefore, that the accumulation of cars in excess of the Steel Company's ability to *unload* under the circumstances, was something for which it alone was responsible.

In *Baltimore & Ohio Railroad vs. Gray's Ferry Co.*, 27 Pa. Superior, 511 (1905), Smith, J., said:

"It was the plaintiff's duty, as a carrier, to transport and deliver all coal consigned to the defendant. It was the defendant's duty, unless relieved therefrom by agreement with the carrier, to provide itself with the necessary facilities for the prompt unloading and return of the plaintiff's cars. If the number of cars consigned to it was so large as to make this impracticable, it should limit its shipments to its capacity for dealing with them, or pay charges for delay. From the usual methods of business, the defendant must be presumed to have controlled the quantity of coal shipped on its order."

Again the demurrage rules provide that if the cars are "bunched," that is, not delivered by the carrier in the order in which they are shipped, but delivered in accumulated numbers, the consignee will be accorded relief upon giving notice to the carrier. The specific rule (see demurrage tariffs, Exhibits "A" and "B," pages 17 and 29) reads as follows:

"RULE 8, SECTION B-2. Cars for unloading or re-consigning. When, as the result of the act or neglect of any carrier, cars destined for one consignee, at one point, are bunched at originating point, in transit, or at destination, and delivered by the Railroad Company in accumulated numbers in excess of daily shipments, the consignee shall be allowed such free time as he would have been entitled had the cars been delivered in accordance with the daily rate of shipment. Claim to be presented to Railroad Company's agent within fifteen (15) days."

This rule is intended to protect the consignee who regulates his shipments in accordance with his ability to unload. Consequently consignees are fully protected if they will simply give the matter the necessary attention, and they should not be heard to suggest in a situation such as that

presented in this case that the matter is beyond their control.

It is true that in the present instance the demurrage has been assessed in accordance with Rule 9 (Exhibits "A" and "B," pages 18 and 30), which provides what is called the average basis for the assessment of demurrage, and that under this rule a consignee is not entitled to take advantage of the "bunching" rule. But the Steel Company was under no obligation to choose the average basis as the basis on which its demurrage should be assessed. It was entitled, if it thought fit, to receive the benefit of the bunching rule and to have its demurrage assessed on what is customarily called the "straight" basis.

Having chosen the average agreement, and having elected to have its demurrage assessed on that basis, it has no ground to complain because the average basis does not make any special allowance on account of bunching. The liberal provisions of the average agreement, as the Commission has several times pointed out, presumably give consideration to possible bunching: *Alan Wood Iron & Steel Co. vs. The P. R. R. Co.*, 24 I. C. C. 27 (1912) at page 32; *Michigan Manufactures' Association vs. Pere Marquette R. R., et al.*, 31 I. C. C. 329 (1914) at page 335; *Castner, Curren & Bullitt vs. Penna. Co.*, 42 I. C. C. 3 (1916), at page 4; *Davis Sewing Machine Co. vs. P. C. C. & St. L.*, 51 I. C. C. 191 (1918) at page 193.

However the matter be considered, the consignee is in a position to control the situation and the railroad is not. The railroad's equipment is being detained under load and being rendered unavailable for use in other service despite the imperative need for such use. These cars arrived during December, February and March. The Steel Company knows well enough that ore frequently freezes in cold weather, and if it chooses to have its shipments forwarded in such volume that it cannot unload them all during the free time when they arrive frozen, it is in no position to complain that it is penalized because of matters beyond its control.

HENRY WOLF BIKLÉ,
FREDERIC D. McKENNEY,

For Petitioner.

FILED
MAR 11 1920

JAMES D. MAHER,
CLERK.

NO. 301 OCTOBER TERM, 1919

IN THE

SUPREME COURT
OF THE UNITED STATES

PENNSYLVANIA RAILROAD COMPANY, a Corpor-
ation, Petitioner,

vs.

KITTANNING IRON & STEEL MANUFACTURING
COMPANY, a Corporation

On Writ of Certiorari to the Supreme Court of the
Commonwealth of Pennsylvania.

Brief of Respondent

R. L. RALSTON,
Of Ralston and Graff,
H. V. BLAXTER,
Attorneys for Respondent.



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**On Writ of Certiorari to the Supreme Court of the
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ARGUMENT

The legal proposition presented by this petition involves the application of the demurrage rules of Pennsylvania Railroad Company. The rules involved

in this case read as follows:

Rule 2.

"Section A. Forty-eight hours (two days) free time will be allowed for loading or unloading on all commodities."

Rule 7.

"After the expiration of the free time allowed, a charge of one (\$1.00) dollar per day, or fraction of a day, will be made until car is released."

Rule 8.

"No demurrage charges shall be collected under these rules for detention of cars through causes named below. Demurrage charges assessed or collected under such conditions shall be promptly cancelled or refunded by the railroad company."

"Section A. 2. When shipments are frozen while in transit so as to prevent unloading during the prescribed free time. This exemption shall not include shipments which are tendered to consignee in condition to unload. Under this rule consignees will be required to make diligent effort to unload such shipments."

In addition to the above quoted rules the defendant had entered into the average agreement contract with the plaintiff. The average agreement contract abrogates all rules for cancellation of demurrage charges for weather interference under Section A, except the rule above quoted, concerning frozen shipments. 2. It also abrogates all of section B which

provides for cancellation of demurrage on account of bunching cars at originating point, in transit, or at destination. It will thus be noticed that under the average agreement the frozen shipment rule is carefully preserved for the benefit of the consignee.

Under the facts shown in the stated case \$1209.00 of the demurrage claimed accrued on cars containing ore which had become frozen in transit, delivered to the defendant during the months of December, February and March and that these cars delivered in this condition could not be unloaded by the defendant company by using diligent effort, at a faster rate than five per day. The dates of delivery and the number of cars delivered during these months are shown in Exhibit "C", on page 21. By a mathematical calculation made from the foregoing facts, allowing forty-eight hours free time on each car and counting that five cars were unloaded each day, the demurrage charge upon these cars amounts to twelve hundred nine dollars. This seems to be the claim of the plaintiff company and as the burden rests upon the plaintiff to prove its claim before it can obtain a judgment, it has certainly failed. Had the defendant failed to make diligent effort and not unloaded five cars per day the failure would be shown in an increased claim for demurrage.

The question involved in this petition, therefore, is whether the defendant company by reason of its having facilities for unloading more than one car of frozen ore within forty-eight hours is bound to pay demurrage on all cars of frozen ore delivered to it which it failed to unload within that time.

The demurrage rule cited above does not sustain such a contention. Had such been the intention of the author of the rule it would have read, "When a carload is frozen while in transit so as to prevent unload-

ing it during the prescribed free time," and the remainder of the rule written in harmony with this idea, the petitioner might have some ground for its contention. The word "shipment" defined as "that which is shipped," used in the plural, is very far removed from "car" or "carload." The learned trial judge defined "a shipment to be a consignment as delivered by the railroad company, be it one car or one hundred cars," and the definition is an apt one, and the word "shipments" as used in the different consignments, not necessarily from the same consignor, nor originating at the same place. It is therefore totally immaterial whether the ore received by the appellee during December, February and March constituted one shipment or many shipments, or whether it originated at the same place or came from different places and from different consignors. The rule is broad enough to include them all.

This rule has to do with shipments and not with cars or carloads. The car is made the unit only for the computation of the demurrage, and such is the use made of it in the demurrage rules. The case of

Darling & Co. vs. P. C. C. & St. L. Ry. Co.
37 Interstate Com. Repts., 401,

bears out this idea. The car is the unit for computing demurrage, just as a ton avoirdupois is used as the unit upon which the transportation charge for the ore is counted. The individual car is used upon which to count the demurrage, but the rule governing demurrage on frozen commodities uses the term "shipments" and provides that when shipments are frozen no collection of demurrage charges for detention of the cars is allowed.

The purpose of the frozen shipment clause in the

demurrage rules is plain and it is retained in the average agreement contract for the same reason. It is to enable consignees to order deliveries at all seasons of the year without danger of loss through demurrage charges on frozen shipments. If no provision were made by the railroad company, orders for ore and coal would not be given during the winter months lest the consignee suffer a great loss by reason of these demurrage penalties. This would result in placing upon the railroad company the burden of transporting all ore and coal and like commodities in the warmer seasons and causing their equipment to lie idle during the colder weather. While it is true that coal and ore may usually be transported during the winter season without freezing in the cars, yet it is a well known fact that no one can foretell when weather changes which will cause such conditions will come. It is to enable the consignee to order the delivery of these commodities with some degree of safety that this clause is found among the demurrage rules. But if the construction of this rule contended for by petitioner be adopted it defeats this very purpose. No consignee can unload frozen ore or frozen coal as rapidly as when it is not frozen. In fact very few consignees have any devices such as the defendant for steaming the cars and unloading as rapidly. If this be the meaning and application of this clause then a consignee in ordering deliveries during the winter season must regulate and reduce his orders so that he will at all times be able to unload all cars delivered to him even frozen within forty-eight hours, if he is able to unload one car of frozen lading within this period. As an illustration of this, suppose a coal consignee receiving coal shipments under the average agreement contract is able by placing twenty-five men on a car of frozen coal to quarry this lading from the

car within forty-eight hours, then it follows that he must unload fifty cars within the same length of time. It doesn't matter whether he has the men available or not, or whether he has yard room in which he can work at the unloading of fifty cars at one time. The rule is imperative that he unload all these cars or pay the demurrage. Had this same consignee distributed the twenty-five men over as many cars and spent twenty-five days unloading twenty-five cars no demurrage could be collected on any of the frozen shipment. Such a construction of the rule is destructive of its purpose and renders ridiculous a demurrage rule evidently written for the advantage of both the consignee and the carrier.

The fact that the defendant received this consignment under the average agreement contract does not change the application of the frozen shipment rule. While the average agreement contract abrogates a great number of the paragraphs under Rule 8, the frozen shipment paragraph remains and is part of the average agreement. The average agreement abrogates paragraphs one and two in Section B of Rule 8, in regard to bunching cars, so that even if the cars in this shipment were bunched en route by the carrier, the notice provided for in paragraph two of Section B would be of no avail to the defendant. It is therefore of no importance in this issue that this notice was not given. If the shipments had been delivered in a normal condition, bunching by the carrier would not be a defense to this demurrage, and the notice of the bunching would have availed nothing. But these shipments were delivered frozen and that abnormal condition is provided for in the average agreement. The fact that this provision is so expressly retained in the average agreement while the consignee gives up other beneficial provisions certainly means that the con-

signee shall receive the benefit of it. Had it been intended that the average agreement would effect the rights of the consignee in respect to frozen shipments, it would have been set forth in the average agreement in no uncertain way. The average agreement sets forth exactly what rules on demurrage are affected by its provisions and the frozen shipment paragraph is not mentioned.

The respondent is somewhat puzzled by the printing in petitioner's paper book of what purports to be letters between the learned counsel for the petitioner and the secretary of the Interstate Commerce Commission. These letters do not seem to be any part of the record in the common pleas court from which this appeal was taken, nor were they ever offered as exhibits at any hearing of the case. They are not identified or authenticated in any way.

In addition to this, the letters written by the secretary of the Interstate Commerce Commission do not set out the facts upon which the ruling is made so that the opinion standing by itself amounts to nothing. Even the letter addressed to the Interstate Commerce Commission does not seem to be the foundation for this decision as this letter only conveys the information that the facts are contained in the file and in other letters of the auditor which are enclosed to the Interstate Commerce Commission. It can readily be seen that the facts upon which this letter of the secretary was based are not before this court even if these papers should be considered sufficient to be called a decision of this commission. In addition to this, this letter shows that on the facts contained in the file the Pennsylvania State Railroad Commission took a different view of the right of the railroad company to collect the demurrage and decided adversely to its claim.

The question involved in this appeal has to do with

the interpretation and construction of a contract and is a question proper for judicial decision rather than within the jurisdiction of the Interstate Commerce Commission. It is not a question of the right of the railroad company to make a rule authorizing the collection of demurrage, but it is the meaning of a contract already made by the railroad company in which the demurrage rule is a covenant. This makes the question one for the courts, so that even a decision of the Interstate Commerce Commission on the question involved could not be anything more than persuasive and would not be binding upon this court. For these reasons it matters little upon what facts the letter of the secretary was based.

Our contention therefore, is that the demurrage assessed upon these cars of frozen ore cannot be collected because the language of the demurrage rules expressly excepts such a case from this penalty; because the infliction of this penalty would be in violation of the purpose and spirit of the demurrage rules; and because no precedent can be shown where such a construction and application of the rules have met with the approval of any judicial tribunal.

Respectfully submitted,

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